NO. 70-18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

JANE ROE, et al.,

Appellants

vs.

HENRY WADE,

Appellee

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF AMICUS CURIAE ON BEHALF OF ASSOCIATION OF TEXAS DIOCESAN ATTORNEYS, IN SUPPORT OF APPELLEE

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October 15, 1971

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INTEREST OF AMICUS CURIAE

The Association of Texas Diocesan Attorneys appears as amicus curiae with the written consent of both parties, given in letters which have been filed with the Clerk of this Court. The Association is organized to provide mutual aid and benefit for its members in dealing with all problems of a legal nature relating to bishops, priests, religious, dioceses, parishes, orders, congregations, societies in the Roman Catholic Church, and their work, and all that relates thereto. The Association has been in existence for a number of years and has an active voting membership consisting of licensed Texas lawyers designated by their respective Ordinaries. While subserving the end for which it was organized, the Association is an autonomous one and independent of the above-mentioned Church. One of the legal problems relating to the named offices, divisions, and societies of the Church with which they, and thus the Association, are concerned is the problem of abortion. The position of the Roman Catholic Church on abortion, long since taken, was elaborated for the first time by a general council of this Church, the Second Vatican Council, and promulgated by Pope Paul Paul VI on December 5, 1965. It stated:

> "Life from its conception is to be guarded with the greatest care. Abortion and infanticide are horrible crimes." Second Vatican Council, De ecclesia in mundo huius temporis (Guadium et spes), sec. 51.

The Roman Catholic Church in the United States and the amicus Association seek to encourage and foster the rights guaranteed by the Constitution of the United States and endeavor to vindicate those rights whenever threatened.

Amicus appears here because of its conviction that unborn children have been deprived by the decision of the court below of the protection of a valid state statute prohibiting abortion except in defined circumstances with the effect of denying their federal constitutional right to life and all other federal and state rights consequent upon the enjoyment of this right.

STATEMENT OF THE CASE

Amicus respectfully refers the Court to the statements of the case incorporated in the brief for appellants but asserts that the statement of appellants contained in their last sentence on page 15 of their brief is incorrect insofar as it advances the argument that the issuance of the judgment by the lower court in declining to enforce its declaratory judgment was one "without meaningful effect." Whether or not that judgment was without meaningful effect depends upon the resolution of constitutional issues presented in this case and focused upon in the brief of amicus.

QUESTIONS PRESENTED

1. the unborn child must or may reasonably be viewed by the State of Texas as a person for the purposes of giving effect through statutory and decisional law to the safeguards of the person contained in the Constitution of the United States as expressed in the Fourth Amendment, the Due Process Clauses of the Fifth and Fourteenth Amendment, and the Ninth Amendment?

2. Whether, in the event the unborn child must or may reasonably be viewed by the State of Texas as a person for the purposes of giving effect to the safeguards of the person in the Fourth, Fifth, Fourteenth, and Ninth Amendments, the unborn child has a right to life under these amendments vis-a-vis its single mother or married parents who desire to terminate its life that this State has reasonably protected through Articles 1191-1194 and 1196 of the Texas Penal Code, which prohibit the performance of abortions unless "procured or attempted by medical advice for the purpose of saving the life of the mother"?

3. Whether, in the event the unborn child has a right to life protected by the Fourth, Fifth, Fourteenth, and Ninth Amendments but Articles 1191-1194 and 1196 of the Texas Penal Code, although directed to protection of that

life, are held to be unconstitutional and to be given no further operation, a federal court can constitutionally delegate the power of decision-making with respect to the continued enjoyment by unborn children of their right to life to private persons, viz., single women, married persons, and physicians such as the appellants in this case without making provision for the grounds upon which abortions may constitutionally be secured or performed and for official institutions to administer such standards in accordance with the requirements of procedural due process?

SUMMARY OF ARGUMENT

Although there are numerous issues involved in this case, this brief will address itself only to three, so as to avoid repetition of the arguments presented by appellee and by other briefs of amicus curiae. We believe that the time is ripe for this Court to determine that the unborn child or foetus is a person for the purpose of administering the safeguards of the person contained in the Fifth, Fourteenth, and Ninth Amendments; that the unborn child, however unwanted or considered to be a burden by its parents, has a constitutionally protected right to life; and that the protection of their lives accorded by a state to unborn children through statutory provisions like Articles 1191-1194 and 1196 of the Texas Penal Code is a reasonable protection that a state can constitutionally provide those children. Stating the last proposition differently, the protection of the unborn child or foetus under statutory provisions like Articles 1191-1194 and 1196 of the Texas Penal Code does not unreasonably impair the personal freedom of married couples or of single women, their right to determine the number and spacing of their children, or their rights to marital privacy, personal privacy, or physical privacy so far as these are constitutionally recognized. Neither do these statutory provisions unreasonably impair the constitutional right of physicians to administer health care to women.

Most of the arguments by appellants and amicus curiae in support of appellants proceed almost exclusively

to consider the constitutional rights of married couples and of single women and to analyze the applicable constitutional provisions as well as the judicial gloss upon them without really considering whether, for the purpose of administering the constitutional safeguards of the person, the unborn child or foetus is a person and has the right to life as a matter of federal constitutional right. It is the position of amicus that the unborn child or foetus possesses the status of a person and is entitled to protection of its life as a matter of fundamental federal constitutional right. This court cannot adequately dispose of this case on the merits without a decision upon these and related matters.

Amicus urges this Court to render a decision holding that the three-judge court erred in holding that Articles 1191-1194 and 1196 of the Texas Penal Code are unconstitutional (1) insofar as that decision was reached without recognition that the unborn child or foetus is a person within the meaning of and has a right to life protected by the constitutional safeguards of the person contained in the Constitution of the United States and, most especially, in its Fifth, Fourteenth, and Ninth Amendments; (2) insofar as that court held the right of single women and married persons to choose whether to have children, as protected by the Fourteenth Amendment, was infringed by the above articles; and (3) insofar as the court did not apply in favor of unborn children and the protection of their right to life the same constitutional standard it applied "under the Ninth Amendment" in favor of single women and married persons and their right to choose whether to have children.

ARGUMENT

POINT ONE

THE UNBORN CHILD OR FOETUS IS OR MAY BE REASONABLY TREATED BY THE STATE AS A PERSON WITHIN THE MEANING OF THE CONSTITUTIONAL SAFEGUARDS OF THE PERSON CONTAINED IN THE CONSTITUTION OF THE UNITED STATES, AND ESPECIALLY IN THE FOURTH, FIFTH, NINTH, AND FOURTEENTH AMENDMENTS.

A. The Stance From Which The Court Should Approach This Constitutional Issue

In Application of Yamashita, 327 U.S. 1 (1946) the petitioner, a defeated general of a recent enemy nation had been sentenced to hang by a United States military commission, asked this Court to consider the issue of whether or not, as he contended, he, as a person, had been deprived of his rights to a fair trial in violation of the Due Process Clause of the Fifth Amendment by the action of that commission in admitting in evidence of depositions, affidavits and hearsay and opinion evidence. This Court, in a decision by a divided panel that had been subjected to extensive criticism, refused to pass upon this contention, without even determining whether the petitioner was a "person" entitled to invoke the protection of the clause invoked. In response to the petitioner's contention, the Court simply stated:

> "We have considered, but find it unnecessary to discuss other contentions which we find to be without merit." 327 U.S. at 25.

This case, as it has been handled by the lower court, is very similar to the Yamashita case. It involves a party, here a state officer, who impliedly asserted before the lower tribunal that a certain class of human beings, here unborn children, are "persons" within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments; that these persons have a right to life protected by these clauses; that the State has a right to enact an abortion law to protect that constitutional right; and that the abortion law, as enacted, does not violate the Fourth, Fifth, Fourteenth, or Ninth Amendments insofar as single women and married couples also have constitutional rights protected by these provisions. The lower court, as did this Court in the Yamashita case, did not address itself to the central, primordial constitutional issues that had been properly raised by one of the parties in the case, here the appellee. It is the position of amicus that the decisional process utilized by the lower court was a denial of procedural due process of law to appellee and to the

unborn children whose lives were sought to be protected by the statute appellee was attempting to defend as to its constitutionality. Since what the lower court did in this case follows the precedent for that action contained in Yamashita, amicus urges this Court to overrule the latter case at least insofar as it seems to authorize what the lower court did.

Mr. Justice Rutledge, in a dissenting opinion in the Yamashita case, stated the point of view that must surely control consideration of the issues by this Court in this case. Referring to the fact that the decision was "unprecedented in our history," he stated:

> "The novelty is legal as well as historical. We are on strange ground. Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand.
>
> "...I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy

belligerents, it can be pushed back wider for others, perhaps ultimately for all.

"The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause." 327 U.S. at 43, 79.

In this case this Court once again, as in Yamashita, stands on strange ground and at the end of the narked way. The great issue in this case is whether the nborn child or foetus is a person within the meaning of he constitutional safeguards of the person contained in he Constitution of the United States, and especially in ts Fourth, Fifth, Fourteenth, and Ninth Amendments. For, f the unborn child is a person for constitutional purposes, he whole framework of argument and decision must be changed rom that adopted, respectively, by the appellants and the ower court. This result would mean that the unborn child, s a person, is entitled, in general, to the protection of ts life under the Constitution of the United States and hat in assessing the validity of state abortion legisla- ion directed toward the protection of this constitutional ight, the right to life of the unborn child must be con- idered and evaluated by the courts quite as thoroughly and qually as the rights of single women and married couples ith respect to marital privacy, personal privacy, physical ntegrity, personal freedom, and determination of the num- er and spacing of their children.

In short, amicus urges this Court squarely to face nd resolve the issue properly and explicitly raised by the ppellee, a state officer charged with the performance of important function by his state, as to whether the un- orn child or foetus is a person within the meaning of the onstitutional safeguards of the person contained in the onstitution of the United States, and especially in its

Fourth, Fifth, Ninth and Fourteenth Amendments, and as to whether the unborn child or foetus, as a person, has a constitutional right to life. To do otherwise would be for this Court to deny procedural due process to appellee and to all those whom, in the name of the State of Texas, this appellee represents.

B. The concept of the person utilized in the Constitution of the United States and in its first ten Amendments had a well-defined meaning for those who framed and adopted their provisions that clearly included the unborn child or foetus who was deemed by them to be a subject of rights, including the right to life, and a person to whom its parents as well as political society itself owed important duties of care and support. As a matter of sound constitutional interpretation theory, this Court must recognize and apply this meaning of the concept of the person and implement the purpose underlying the employment of this concept as the foremost principle of this Constitution.

Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137, 179-180, stated "that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." While his focus in that case was primarily upon a legislative disregard of a Constitutional rule, it was also upon avoiding a like judicial disregard of that rule. It is not without significance for the instant case that the Chief Justice, in selecting a few of many parts of the Constitution to illustrate his basic proposition, referred to one of the explicit safeguards of the person contained in the Constitution, Section 3 of Article III:

> "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Ibid.

It would have been just as inadmissible by the Chief Justice and the other members of the Court in 1803 that this rule

did not speak to and bind the Court insofar as it provided that a "person" was to be protected by the rule as it was inadmissible to them that the type of the protection to be accorded the person as specified in this rule did not speak to and bind the Court. Not just part but the whole of this and other rules of the Constitution must be deemed to be "rules for the government of courts." Thus, each of the rules of the Constitution providing a safeguard either expressly or impliedly for the "person," including the Fifth, Fourteenth, and Ninth Amendments, must be viewed in the same way. For this reason, the inevitable first task for the Court in this case, where a state asserts the right of the unborn child, as a person, to live, as the basis for sustaining its challenged abortion law, is to determine what is the appropriate meaning to be assigned the term "person" expressly or impliedly used by the framers of the Constitution in establishing its fundamental safeguards of the person. The Court must recognize that the Fifth, Fourteenth, and Ninth Amendments also provide a "rule for the government of the legislature" of a state in the sense that the state is entitled and in some instances duty bound to take positive, affirmative action to protect the federal constitutional rights of the persons safeguarded by them. See, e.g., Brewer v. Hoxie School District No. 46, 238 F.2d 91 (8th Cir. 1956).

Chief Justice Marshall in the Marbury case provided the essential principle for approaching the problem of determining the meaning of the term "person" as used in the Constitution. He said:

> "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act,

they are designed to be permanent." 1 Cranch at 176.

Of all the principles the people of the United States established in their Constitution none can be more paramount than those designed by them for safeguarding the civil rights of the individual person. Indeed, so concerned were the people of the United States for providing these safeguards that it is altogether likely that the Constitution, which did not contain such safeguards in the form of a Bill of Rights as did the state constitutions, would not have been adopted by sufficient states unless the Federalists, sensing the impending disaster, had not made a gentlemen's agreement that they would propose and submit in the First Congress in 1789 detailed amendments to establish a comprehensive federal Bill of Rights.[1] Both John Adams and Thomas Jefferson, when they first received news of the Constitution at their London and Paris ministerial posts, respectively, agreed that they were very distressed that it did not contain a bill of rights providing "for the whole catalog of civil rights commonly accepted as fundamental in America" to guarantee freedom of the person.[2] This agreement was, of course, carried out by the next Congress on September 25, 1789.

Moreover, it was the "original right" of the people of the United States to adopt a concept of the person for inclusion in and administration of their Constitution as "in their opinion, shall most conduce to their own happiness," as Marshall stated. It is the meaning and the purpose of the people who framed, debated, and adopted the Constitution and its Bill of Rights to safeguard the person that must be respected by this Court. Even if many of the present generation have come to view the religious motiva-

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[1]See, Robert Allen Rutland, The Birth of the Bill of Rights: 1776-1791. Chapel Hill: The University of North Carolina Press, 1955, 119-218.

[2]Id. at 129.

tion, the philosophy of natural rights, and the views of the person entertained by the framers and adopters of the Constitution as lacking in validity, this Court is not free, because of its dedication and commitment to the rule of law, to disregard the meaning of the concept of person the framers entertained when they inserted it into the constitution safeguards of the person. It was their "original right to establish, for their future government" the principles that "in their opinion" were to be subsequently treated as "fundamental" and as "designed to be permanent." Citizens may today reject, although with perhaps great loss of societal direction, the religious motivations, philosophy of natural rights, and view of the person entertained by the constitutional framers, but they cannot avoid or set aside the objective choice made by those framers of the meaning to be given the normative concept of the person placed by them in the Constitution. If this Court must respect still today the choice of the framers in the First Amendment rule that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...," it must also still respect the rule that "nor shall any person... be deprived of life, liberty, or property, without due process of law." If we must be very vigilant about judicially enforcing the requirement that "no law" respecting an establishment or religion shall be made, we must also be very vigilant about judicially assuring that any person obtains due process of law with respect to deprivations of his life, liberty, or property by action of the state or nation.

Chief Justice Marshall has also provided this Court with the interpretative theory to implement the basic approach he laid down for assigning meaning to provisions of the Constitution. In Gibbons v. Ogden, 9 Wheat. 1, 188-189, while referring to the problem of construction of a clause conferring a power upon Congress, he stated:

> "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlighted patriots who framed our constitution,

> and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case."

Precisely the same reasons that commended this rule of constitutional interpretation to the Court for the purpose of assigning meaning to a provision granting power to Congress commends it even more highly as the basis for assigning meaning to provisions designed for the safeguarding of the persons who established the constitution. In Boyd v. United States, 116 U.S. 616, 635, Mr. Justice Bradley in the opinion for the Court stated this principle:

> "...illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis."

Still another principle of constitutional interpretation bears even more closely upon the function of this Court in giving effect to the safeguards of the person which the people of the United States established in the exercise of their "original right." This principle was also articulated by this Court in the Boyd case, supra, and has

reference to the relevance of conceptions of personal freedom entertained by those who framed the provisions of the Constitution and its first ten amendments. In the Boyd case, the question was whether a statute which provided for compulsory production of a man's private papers to be used in evidence against him in a proceeding to forfeit his property, was unconstitutional as authorizing an unreasonable search and seizure within the meaning of the Fourth Amendment. In deciding that the statute was unconstitutional, the Court referred to the contemporary conceptions of personal freedom entertained by American statesmen at the time of the adoption of the Constitution and of the first ten amendments to it. The subject of unreasonable searches and seizures had been thoroughly canvassed in the quarter of a century just preceding their adoption, and especially in the discussion of Lord Camden in the celebrated case of Entick v. Carrington, 19 Howell, St. Tr., 1029. Referring to this discussion, Justice Bradley stated for the Court:

> "As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. ...Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and unreasonable character of such seizures?" 116 U.S. at 627, 630.

Putting these three long established and honored principles of constitutional interpretation to work in this instant case requires this Court to hold that the unborn child was clearly within the meaning of the concept of the

person adopted by the American statesmen who formulated the Constitution and its first ten amendments and that it was their purpose to have its safeguards of the person applied by courts and legislatures to the unborn child or foetus and especially so as to recognize a constitutionally guaranteed right to life.

James Wilson, who helped formulate, voted for, and signed the Declaration of Independence, participated in the Constitutional Convention and signed the proposed Constitution of the United States, and served as an Associate Justice of the Supreme Court of the United States had something to say about the concept of the person.[1] This remarkable Pennsylvania lawyer, member of the Continental Congress, classical scholar, draftsman of the Pennsylvania Constitution, and person chiefly responsible for the adoption of the Constitution of the United States by Pennsylvania was also a professor of law at the College of Philadelphia at the same time he served upon the Supreme Court of the United States. Steeped in the philosophy of natural law and well-acquainted with the basic concepts of those revolutionary times, he was in an especially good position to articulate the meaning of the concept of the person generally shared by his fellow citizens and woven into the sinews of the colonial and state Bills of Rights and finally into the Constitution of the United States. In his law lectures delivered in the winter of 1792, Justice Wilson stated:

> "Persons are divided into two kinds — natural and artificial. Natural persons are formed by the great Author of nature. Artificial persons are the creatures of human sagacity and contrivance; and are formed and intended for the purposes of government and society."[2]

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[1]Charles Page Smith, James Wilson: Founding Father. Chapel Hill: The University of North Carolina Press, 1956. 87-88, 246-61, 305.

[2]The Works of James Wilson, James DeWitt Andrews, Ed., Chicago: Callaghan and Co., 1896. Vol. II, p. 3.

In this statement Wilson was simply reflecting the ommon view of the Constitutional Fathers that the person as not something subject to man's contrivance, like the rtificial person which is the corporation or the state, ut above and apart from and prior to any construction or ontrivance of man. The person was for the makers of our onstitution a datum, a given, a being created "by the reat Author of nature." The status of person was not omething to be conferred by the state or even all the eople of the state. A person simply is and has his being y virtue of an act of creation by God himself — this was he concept of the person for those who wrote and adopted he Constitution of the United States.

This concept of the person was Christian in its rigin and in its development. Its meaning had been laborated long before the period of American constitution-aking even if it had never been woven as securely into the abric of a legal order as it was to be in 18th Century erica. Man was deemed to be a composite of body and soul, he latter having been given to him closely consequent upon he human event of conception in an act of creation by "the nly Creator of human souls: God."[1] As Doctor John itherspoon, the sixth president of Princeton University nd signer of the Declaration of Independence, observed and aught his students:

> "Considering man as an individual, we discover the most obvious and remarkable circumstances of his nature, that he is a compound of body and spirit."[2]

d as the great teacher of American statesmen, John Locke, t it in the best Christian tradition:

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[1]Etienne Gilson, The Spirit of Mediaeval Philos-hy. London: Sheed & Ward, 1950. 203.

[2]John Witherspoon, Lectures on Moral Philosophy. rinceton: Princeton University Press, 1912. 8.

> "God, I say, having made man and the world, ... directed him by his senses and reason...to the use of those things which were serviceable for his subsistence, and gave him the means of his 'preservation'...and therefore had a right to make use of those creatures (animals) which by his reason or sense he could discover would be serviceable thereunto..."[1]

No man had greater influence upon the minds of the Constitutional Fathers than John Locke. His Second Treatise of Government was characterized by Sir Frederick Pollock as "probably the most important contribution ever made to English constitutional law by an author who was not a lawyer by profession."[2] Beyond this it has been generally recognized that "the principles of the American Revolution were in large part an acknowledged adoption of the ideas it contained."[3] In Locke's discussion of paternal, or as he preferred to call it, "parental" power, he observes that

> "Adam and Eve, and after them all parents were, by the law of Nature, under an obligation to preserve, nourish and educate the children they had begotten, not as their own workmanship, but the workmanship of their own Maker, the Almighty, to whom they were to be accountable."[4]

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[1]John Locke, Two Treatises of Government. Book I. New York: E.M. Dutton & Co. (Everyman Library) 55.

[2]Sir Frederick Pollock, Essays in the Law. 1922.80.

[3]W.F. Carpenter, "Introduction to John Locke, "Two Treatises of Civil Government, vii.

Locke, Two Treatises, p. 143.

"The power, then, that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood. ...that duty which God and Nature has laid on man, as well as other creatures, to preserve their offspring till they can be able to shift for themselves..."[1]

Locke pointed out that although the parental duty after procreation of children to care for them could not be put aside until they could shift for themselves, the name and authority of a father or indeed any parent over a child could be quickly lost:

"So little power does the bare act of begetting give a man over his issue, if all his care ends there, and this be all the title he hath to the name and authority of a father."[2]

Locke was simply making the point of the great concern of political society for children and its insistence upon their protection from and after the act of procreation. The name and authority of the parent could be lost if that parent disregarded the very precious value borne by the child as a person through the soul created for it by God. Thus, the foster-father who rescued and then took care of a child who had been exposed by its natural father for the purpose of letting it die gains the title and authority of father and the latter loses it.[3]

Again, in order to emphasize the importance of the child, because it is a person created by God at all of its stages of development, Locke states:

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[1]Locke, Two Treatises, pp 144-145.

[2]Id.

[3]Id. at 147.

"Conjugal society is made by a voluntary compact between man and woman and though it consists chiefly in such a communion and right in one another's bodies as is necessary to its chief end, procreation, yet it draws with it mutual support and assistance, and a communion of interest, too, as necessary not only to unite their care and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them till they are able to provide for themselves.

"For the end of conjunction between male and female being not barely procreation, but the continuation of the species, this conjunction betwixt male and female ought to last, even after procreation, so long as is necessary to the nourishment and support of the young ones. ...This rule...the infinite wise Maker hath set to the works of His hands..."[1]

Moreover, a person, whether a child or an adult, was deemed superior, in a very basic sense to the state and to its law, even its most fundamental law, the constitution. Not only was the person not a creation of man or of his state, but the person was before and above the state and its constitution. Locke stated the principle that

"Men being,... by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and be united into a community for their comfortable, safe, and peaceable living..."[2]

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[1] Id. at 155.

[2] Id. at 164.

Each of the principal American constitutions and bills of rights made this conception of the person and of his relation of the person to the state abundantly clear. The American Declaration of Independence states:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness....That to secure these rights Governments are instituted among Men, deriving their just powers from the consent of the governed, ..."[1] [Emphasis added]

The principal American constitutions and bills of rights also made it clear that while the adult persons were the persons from whom the just powers of government were actually derived by their consent, these adults relative to their children, unborn or born, were performing an act not only for themselves but also for their children, as trustees or guardians for their lives, futures, and happinesses, according to the Lockeian doctrine. Thus, we see that the Virginia Bill of Rights states:

> "1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty..."[2] [Emphasis added]

And, as especially pointed out by Alexander Hamilton in his Paper No. 84, the preamble of the Constitution of the United States states:

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[1]Donald Barr, July 4, 1776. New York: Crown Publishers, 1958. 138.

[2]Robert Allen Rutland, The Birth of the Bill of Rights: 1776-1791. Chapel Hill: The University of North Carolina Pre-s, 1955. 231.

> "We THE PEOPLE of the United States,...to secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States."[1]

It is not without significance that Hamilton quoted the preamble precisely in the form above set out. He was arguing in this paper that there was no necessity for inclusion of a Bill of Rights in the original Constitution to safeguard the persons constituting the people of the United States against their representatives in government. His argument was that these persons, both individually and collectively, were the source of the authority and power of their representatives and the latter had been granted no authority to abridge the fundamental rights of the person, such as life, liberty, or property. Thus he states:

> "Here, in strictness, the people surrender nothing and as they retain everything, they have no need of particular reservations (of rights)."[2] [parenthesis added]

Thus, by his quotation, Hamilton indicates that he is thinking of the rights not only of adults but also children, both born and unborn, their "posterity." It is these rights, he contends, that are not surrendered to the representatives of the people.

Richard Henry Lee, who was closely associated with Patrick Henry and Thomas Jefferson and introduced the resolution in the second Continental Congress for declaring independence on July 2, that was adopted two days later, worked vigorously for the addition of a Bill of Rights to the proposed Constitution. An orator whose associates compared with Cicero, he perhaps articulated better than

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[1] The Federalist. New York: The Heritage Press, 1945. 575-576.

[2] Id. at 575.

most of the Constitution Fathers the sense of what they were about when he said on October 12, 1787 in a popular pamphlet widely read in the states:

> "...when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish...essential rights, which we have justly understood to be the rights of freemen..."[1]

Dr. John Witherspoon in some of his lectures at Princeton at least as early as 1772:

> "Some nations have given parents the power of life and death over their children, and Hobbs insists that children are the goods and absolute property of their parents, and that they may alienate them and sell them either for a time, or for life. But both these seem ill founded, because they are contrary to the end of this right, viz. instruction and protection. Parental right seems in most cases to be limited by the advantage of the children."[2]

Here Dr. Witherspoon carries through to the constitution-making times, to which he contributed much, the basic doctrine of Locke about the duty of parents and the right of their children vis-a-vis each other.

Thomas Jefferson introduced a bill concerning crimes and punishments in 1779 in the Virginia Legislature. It is interesting that he provided for the penalty of hanging and dissection of the body for the murder of a child by its parent.[3] In view of the usual Founding Father

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[1]Pamphlets on the Constitution of the United States, Paul Leicester Ford. ed. 314.

[2]Dr. John Witherspoon, Lectures on Moral Philosophy. Princeton: Princeton University Press, 1912. 84.

[3]Saul K. Padover, The Complete Jefferson. New York: Duell, Sloan & Pearce, 1943. 92.

view of the child as a being a person from the very moment of its procreation or begetting by its parents, one would assume that this bill was directed against abortion at any stage of the development of the child in the womb. Jefferson also showed that he was quite familiar with the law of England with respect to abortion as far back as the Laws of King Alfred. He noted that this law penalized the killing both of a pregnant woman and of her child and that that law required the payment or weregild not only for the killing of the mother but also for the killing of the child. He also took the position that despite his espousal of a constitutional safequard for religious freedom, the state could not permit churches in their sacred rites "to murder a child."[1]

Life on the colonial frontiers involved raids upon the early settlements by hostile Indians. The unborn child was a special target of these raids. The Rev. Joseph Doddridge reported upon the Indian attacks in Western Virginia in the latter part of the 18th Century. He stated that children were the special victims of Indian vengeance because they could either become warriors or reproduce the species. With respect to the unborn child, he reported upon its treatment by the hostile Indians and showed the special concern of the colonists for such treatment and what their reaction was:

> "The Indian kills indiscriminately. His object is the total extermination of his enemies. It is not enough that the fetus should perish with the murdered mother, it is torn from her pregnant womb, and elevated on a stick or pole, as a trophy of victory and an object of horror to the survivors of the slain."[2]

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[1] Id. at 935, 945.

[2] Daniel J. Boorstin, The Americans: The Colonial Experience. New York: Vintage Books, 1958. 347-348.

The Indian forays and attacks in which these and other atrocities were committed were not isolated instances seldom repeated. As Boorstin reports:

> "The Indian was omnipresent; he struck without warning and was a nightly terror in the remote silence of backwood cabins....Every section of the seacoast colonies suffered massacres. The bloody toll of the Virginia settlements in 1622, and again in 1644, was never forgotten in the colony. ...Such nightmares shaped the military policy of settlers until nearly the end of the 18th century. ...The apprehension of another visit from the Indians, and of being driven back to the detested fort, was painful in the highest degree, and the distressing apprehension was frequently realized. In such colonial warfare all were soldiers because all lived on the battlefield. ...among Colonial Americans...war was the urgent defense of the hearth by everybody against an omnipresent and merciless enemy."[1]

The loss of children in warfare was an especially drastic loss in colonial America. The colonials placed a very high value upon children not only because, according to their religion they were persons, but also because they were badly needed in the emerging nation. As Boorstin reports:

> "Labor and skills were scarce in colonial America; men had to do many things for themselves simply because they could not hire others to do them."

Benjamin Franklin indicated that it was easy for poor families to get their children instructed in a trade:

> "for the Artisans are so desirous of Apprentices,

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[1] Id. at 348-352. [Citing The Rev. Joseph Doddridge]

> that many of them will even give Money to the Parent, to have Boys from Ten to Fifteen Years of Age bound Apprentices to them till the Age of Twenty-one; and many poor Parents have, by the means, on their Arrival in the Country, raised Money enough to buy Land sufficient to establish themselves, and to subsist the rest of their Family by Agriculture."[1]

Thus, colonial Americans generally down through the period of the making of the Constitutuion not only revered and respected the unborn child as a person created by God but saw in the unborn an addition to the family who, after birth, could be the way to meet the labor scarcity on the farm and frontier and to enable the family, particularly the poor one, to establish itself firmly in the cities.

The English law concerning abortion discussed by Jefferson as previously noted, had existed since at least the time of King Alfred with both secular and ecclesiastical laws being directed at the problem although by different kinds of sanctions. The Leges Henrici of the time of Henry I reveals that the ecclesiastical laws provided for a lighter penalty if a woman deliberately destroyed her unborn child within the first forty days following conception and a heavier one if she destroyed her unborn child after that period. The common law courts also handled cases of abortion although they exercised a less extensive jurisdiction than that of the ecclesiastical courts. The rule applied by the former was primarily concerned with abortion of a child that was quick or able to stir in the mother's womb. Blackstone in 1765 observed in his Commentaries:

> "1.Life. This right is inherent by nature in every individual, and exists even before the

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[1] Id. at 194.

the child is actually born.

> Rights of Unborn Child. The offence of abortion of a quick child is not murder, but homicide or manslaughter. An infant in ventre sa mere is supposed in law to be born for many purposes. It is capable of having a legacy made to it. It may have a guardian assigned to it, and may have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born."[1]

This recognition of the unborn child as a person before the law is highly significant in view of the fact that as Boorstin reports,

> "...by 1775
> "Blackstone's Commentaries had sold nearly as many copies in America as in England...he had provided for the first time the means by which any literate person could grasp the large outlines of his legal tradition. ...was a godsend to the rising American, to the ambitious backwoodsman and the aspiring politician."[2]

In 1803, only a little over a decade after the adoption of the Constitution of the United States and its first amendments, the English Parliament adopted a statute which characterized as felonies abortions performed either before or after a woman was "quick with child", 43 Geo. III c. 58. The former type of abortion was made punishable by fine, imprisonment, and other lesser penalties. The latter type was made punishable by death. The enactment of this statute may have been a part of the movement

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[1] Blackstone's Commentaries on the Law. Bernard C. Gavit, Ed. Washington: Washington Law Book Co., 1941. 70

[2] Boorstin, supra, at 202.

of replacing the jurisdiction of the ecclesiastical courts, which covered the offense of abortion in a similar way, by enactment of statutes defining crimes to be handled by the common law courts.[1]

We have established that the unborn child or foetus was considered by the Founding Fathers and their fellow citizens to be a person; a subject of rights against its parents from and after their act of begetting or procreating the child until it was born and thereafter until it could shift for itself; a person who was created by the act of God in infusing it with a soul consequent upon the act of procreation; a person, like its parents, endowed by God with unalienable rights to life, liberty and pursuit of happiness and the qualities of being free, equal, and independent; and a person who could not be deprived of these rights and qualities by their parents through a compact or constitution or any other means. This concept of the person was drawn by colonial Americans from their predominantly Christian background; from political philosophers and especially from their principal mentor in political philosophy, John Locke; from ministers and educators like Dr. John Witherspoon of Princeton University; from legal scholars like Blackstone; and especially from their intuition as reinforced by their difficulties and opportunities in dealing with a hostile but bountiful environment.

Since this was the colonial concept of the person, the Founding Fathers who framed the Constitution and their fellow citizens who adopted it must be understood to have employed the word "person" in the constitutional safeguards of the person in what was for them its eminently "natural sense" so as to include the unborn child or foetus. This sense reinforces and supports their goal of wanting to ordain and establish a Constitution not only for themselves but also for their posterity and to

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[1]See, Bernard M. Dickens, Abortion and the Law, Bristol: MacGibbon & Kee, 1966. 22.

secure from the action of wilful men "certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity: namely, the enjoyment of life and liberty." It was the "original right" of the Founding Fathers to adopt such a meaning for the term "person" and to impress it on the Constitution. If effect is to be given to the foundational criterion, established by Marbury v. Madison, supra, for assigning meaning to a constitutional provision- the natural sense in which words are employed and the sense that will promote the objects expressed in the Constitution itself - this Court must hold that the unborn child or foetus is a person within the constitutional safeguards of the person.

Similarly, if effect is to given to the presumption for constitutional interpretation established by Boyd v. United States, supra, that a constitutional provision for the security of the person should be liberally construed, then the term "person" should certainly be extended to cover the unborn child or person, there being so many other good reasons for this construction.

Finally, if effect is to be given to the third basic principle for constitutional interpretation, also articulated in the Boyd case, supra, that contemporary conceptions of personal freedom are to be regarded and particularly those framed in the leading expositions of those conceptions, then the term "person" in the Constitution must clearly be held to cover the unborn child or foetus. The leading expositions were contained in Locke's Second Treatise of Civil Government, supra,; Blackstone's Commentaries on the Law, supra; the Virginia Bill of Rights, and Hamilton's Paper No. 84 in the Federalist, supra. All of these highlighted the position of the unborn child as a person and the duty of parents and political society to provide for its care. The latter two expositions extended this duty to those who make and administer constitutions.

C. Regard for the Context of the Constitution, in the sense of its whole framework in relation to

its various parts and especially those provisions providing safeguards for the person, such as the Fourth, Fifth, Ninth and Fourteenth Amendments, argues strongly for holding that an unborn child or foetus is a person within the meaning of those safeguards.

1. The concept of context in constitutional interpretation.

The value of an examination of the context in which a statutory provision is set for determining the appropriate meaning to be assigned to it has long been recognized. Justice Frankfurter, in a dissenting opinion in United States v. Monia, 317 U. S. 424 at 431, (1942), gave classic formulation to this value:

> "A statute like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process, having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. On the historic process of which such legislation is an incomplete fragment--that to which it gave rise as well as that which gave rise to it-- can yield its true meaning."

Since McCulloch v. Maryland, 4 Wheat. 316, it has been well established that the context in which a term is used in the Constitution must be closely regarded in assigning meaning to it. In construing the word "necessary" in the "necessary and proper" clause of Article I, section 8 of the Constitution, Chief Justice Marshall stated that:

> "...in its construction, the subject, the context the intention of the person using them, are all t be taken into view." 4 Wheat. at 407.

A recent example of the context of the Constitution for this purpose was provided in Duncan v. State of Louisiana, 391 U. S. 145 (1968), where this Court pointed out that, in construing a particular constitutional safeguard of the person, such as the Due Process Clause of the Fourteenth Amendment, "it has looked increasingly to the Bill of Rights for guidance..."[1]

As demonstrated by Chief Justice Marshall's opinion for the Court in the McCulloch case, the concept of context includes not only the immediate context of a provision whose meaning is drawn in question but also the more remote context of the whole Constitution, including other parts likely to throw light upon the usage in that provision.

2. The unborn child has a constitutional right to application of state common law in diversity of citizenship actions at common law under Article III and to a jury trial under the Seventh Amendment.

As construed by this Court Article III, Section 2 of the Constitution, which extends the jurisdiction conferred upon the courts of the United States to controversies between citizens of different states, necessarily provides extensive protection for the unborn child or foetus. In Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938), this Court held that Article III of the Constitution required federal courts exercising jurisdiction in diversity of citizenship cases to apply as their rules of decision the law of the state in which they sit, unwritten as well as written, except in matters governed by the Federal Constitution or by Acts of Congress. Mr. Justice Brandies, in the opinion for the Court, stated that the prior practice of the courts in disregarding the decisional law established by a state's highest court in favor of a federal general common law, was quoting

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[1]Dickens, Abortion, pp 148.

Mr. Justice Holmes:

> "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[1]

As a result of this decision, the interpretation of the Rules of Decision Act of 1789 established by Swift v. Tyson, 16 Pet. 1, to the contrary was overruled and the constitutional required interpretation substituted for it. While Erie did not involve a plaintiff who was an unborn child or who was representing an unborn child at the time of the injury which occasioned the suit, it set the stage for application by federal courts of the extensive state tort law, property law, and other law protecting the rights of unborn children. This law, as will be seen in Point one, provides extensive protection for the rights of unborn children. Thus, Article III of the Constitution of the United States, the Rules of Decision Act of 1789, and the decision in Erie, supra, now operate together to provide the unborn child with the constitutional status of a person in trials at common law in federal courts in cases where state law in applicable because state law accords that status to that child and that law, whether common law or statute law, is constitutionally required to be applied by these courts.

It would be a strange and bizarre constitutional doctrine that would provide protection for the unborn child as a person for the purpose of applying state law in its behalf in diversity of citizenship cases in federal courts under Article III of the Constitution but would deny protection for that same child in the same courts for the purpose of applying the Fifth, Fourteenth, and Ninth Amendments of the same document in a case in which a state asserted the constitutional validity of a statute under those Amendments designed as a reasonable protection of the constitutional right of that child, as a person,

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[1] Id. at 79.

to its life vis-a-vis its mother or parents. This Court should avoid an interpretation of the concept of person which would create such a violent conflict within the Constitution between Article III and the consitutional safeguards of the person contained in the federal Bill of Rights, particularly the Fifth and Ninth Amendments, and in the Fourteenth Amendment. It has refused to reach interepretations. As indicated in the McCulloch, Monia, and Duncan cases, supra, this Court has avoided such results and read the provisions of the Constitution as constituting one harmonious whole, with the purpose and meaning of one part being treated as providing illumination for the construction of its other parts.

Indeed, once this Court reached its decision in the Erie case, it became clear that one of the essential provisions of the federal Bill of Rights, the Seventh Amendment, must be construed to accord the unborn child or its representative an important procedural right at common law. This Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Yet, in Erie, this Court decided that there was no federal general common law but that in diversity of citizenship cases the rules for decision were constitutionally required to be the law of the state in which its sits, including both the statutory law and the decisional law of state courts. Thus, where, as is universally the case, the unborn child is given various substantive rights under the common law or statutes of a state and that child invokes the diversity of citizenship jurisdiction of a federal court, it would seem eminently clear that not only must that court apply the state common or statute law in question under Article III, but also where the protection of state common law is

invoked, it must accord the right of trial by jury to that child or its representatives under the Seventh Amendment. Both that Amendment as a matter of explicit requirement and Article III as construed by this Court in Erie make "the rule of the common law" the rule for decision-making purposes by federal courts, where the suit is at common law. Thus, the decision in Erie necessarily implies, in light of state common law according substantive rights to unborn children, that these unborn children must be recognized to be persons within the meaning of the constitutional safeguard of the person contained in the Seventh Amendment guaranty of a jury trial in suits at common law.

In view of this Court's decisions in the Duncan case, supra, and like cases, the fact that the unborn child must be recognized to be a person within the meaning of the Article III guaranty of the application of state common law in diversity of citizenship cases and within the meaning of the Seventh Amendment guaranty of a jury trial in such cases must surely mean that this Court will give the same scope to the concept of person, as including the unborn child, in administration of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Moreover, since the unborn child must be treated as a person within the meaning of the Seventh of the ten Amendments contained in the federal Bill of Rights as well as within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, it seems clear that this Court must also hold that the unborn child must be treated as a person within the meaning of any other Amendment of the Bill of Rights in which the protection provided is relevant to the protection of the interests of the unborn child. This would obviously include the Due Process Clause of the Fifth Amendment, the Ninth Amendment, and probably also, the Fourth Amendment protection of "persons against unreasonable . . . seizures." Construction of the concept of person in all of these Amendments must be the same since the federal Bill of Rights was adopted, as previously indicated, as an integral package proposed by the Federalists for the better protection of many fundamental rights of the person after the framers recognized that adoption of the Constitution had become doubtful due to its lack of any guarantees of these rights.

In light of the above considerations it must be concluded that the Fourth, Fifth, Ninth, and Fourteenth Amendments must be construed to provide guarantees for the protection of the unborn child as a person. Any other holding would be so to sever them from their environment in the whole Constitution and from historical development of the concept of the person at the time of its adoption as to mutilate their "significance and sustenance."

3. The Citizenship Clause of the Fourteenth Amendment recognizes the unborn child as a person, who, when born, obtains the further status of a citizen. The unborn child has the right to protection of its prospective status as a citizen under the Citizenship Clause of the Fourteenth Amendment.

The first sentence of Section 1 of the Fourteenth Amendment provides:

> "All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Section 1 of the Fourteenth Amendment was drafted by Representative John A. Bingham of Ohio.[1] The debates concerning the adoption of the Fourteenth Amendment demonstrates the continuity in the conception of the person as between the times of the American Revolution and those of the post-Civil War period. The view of the person as an act of creation by God when he infuses a soul into the unborn child or foetus upon its being conceived is expressed by the draftsman of Section 1:

> "By that great law of ours it is not to be inquired whether a man is 'free' by the laws of England; it is only to be inquired is he

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[1] The Reconstruction Amendments' Debates. Alfred Avins, Ed. Virginia, Richmond: Virginia Commission on Constitutional Government, 1967. 760.

> a man, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty. . . . Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal ".[1]

Representative Andrew J. Rogers of New Jersey emphasized the two types of right being spoken to by the Civil Rights Bill under discussion in March 1966:

> "There are only two kinds of right: one is that which a man acquires from the municipal laws. There is another right which God gives us, the right of self-defense, the right to protect our lives from invasion by others. There are no other rights but the rights of nature and the great civil rights. . . ."[2]

One of the central purposes of the Citizenship Clause of Section 1 of the Fourteenth Amendment was to make it certain that members of the Negro ethnic group as well as every other class of person obtained the political right of citizenship when born in the United States to add to their natural rights that they were considered to have received at conception from God. A common view of the members of Congress in 1866 was expressed by Representative William Lawrence of Ohio:

> "This clause is unnecessary, but nevertheless proper, since it is only declaratory

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[1] Id. at 274.

[2] Id. at 166.

of what is the law without it."[1]

The most significant aspect of Section 1 of the Fourteenth Amendment was to reinforce the rights of the person by conferring upon the "person born . . . in the United States" the political right of citizenship and by making it incumbent upon the states to respect the natural rights of the person. In reinforcing the natural rights of the person vis-a-vis the states, the overriding purpose was to give the concept of person the widest possible coverage. As stated by Senator Arthur I. Boreman of West Virginia:

> "This, you will see, sir, is not confined to citizens of the United States, but it includes every person that is found within these States, and guarantees to all life, liberty, and property, and equal protection of the laws." . . . So that while, before this amendment, any class of persons in this country over whom the protection of the Constitution of the United States was not extended, there cannot now be any longer any question on that subject."[2]

The above extracts from the debates concerning the Fourteenth Amendment and Civil Rights legislation in the post-Civil War period, which are typical, demonstrate not only the continuity of those times with the times of the American Revolution so far as the concept of the person as including the unborn child is concerned, but also manifest a purpose to confer citizenship upon any person upon his birth and to give the concept of person the widest possible application in the event there "was any question whether there were any class of person in this country over whom the protection of the Constitution of the United States was not extended . . ." particularly, in applying to the states a bill of rights comparable to that applicable to the federal government.

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[1] Id. at 205.

[2] Id. at 558.

Due to its origin and purpose, the Citizenship Clause of Section 1 of the Fourteenth Amendment must be viewed as referring to unborn children, among others, when it speaks of "[A]ll persons born . . . in the United States and subject to the jurisdiction thereof. . . ." The unborn child is the "person" before birth who, by virtue of being "born" in the United States, becomes a citizen of the United States. In what sense could an unborn child be in any substantial sense less a "person" 8 minutes, 8 weeks, or 8 months before birth than at the moment of birth or some equivalent time thereafter? The child was, in the view of the person generally accepted at the time of the adoption of the Constitution and of the Fourteenth Amendment, as much a person before birth as after. Its natural right to life came to it, as again expressed by the draftsman of Section 1, by virtue of the fact of creation of its soul by God.

But if the unborn child is a person included within the concept of the person utilized in the Citizenship Clause of the Fourteenth Amendment, surely the unborn child must be recognized under this clause to have the right to claim protection from the federal courts for its prospective status when born, of citizenship. Surely, also, the state in which it is present must have the right to enact statute law designed to protect that prospective status of the unborn child also. The Citizenship Clause speaks of two forms of citizenship: a citizenship of the United States and a citizenship of the State where the person resides. The State wherein an unborn child resides has a very special reason, aside from its general interest in protecting persons in the enjoyment of their fundamental rights, for protecting the life of the unborn child. That child is a prospective citizen of that State. It is greatly needed by the State and the child greatly needs the State.

If the unborn child cannot obtain the protection of its prospective status as a citizen under the Fourteenth Amendment from federal and state courts and the state legislatures, citizenship of the United States and of a state is a very precarious right. Next to the right to life, the right to citizenship ranks very high in the hierarchy of

rights of the person. That was the judgment of the common law and it was the judgment of those who drafted and adopted the Fourteenth Amendment. In general, there can be no citizenship attained by birth unless the right to life of the unborn child is protected. No unborn child can attain its citizenship unless its life is protected from and after the moment of its conception until the moment of birth against action that will certainly destroy it. Thus, protection of the right of the "person born" in the United States to be a citizen of the United States surely cannot be confined only to the period beginning with birth. If that right is to be effectively protected, the unborn child must be recognized to possess a prospective right to citizenship, a right contingent only upon successful completion of the process of birth from a mother living in the United States.

The matter may be viewed in another light. We are accustomed to speaking of the prospective jurisdiction of courts and the necessity they are sometimes under of acting to preserve that jurisdiction. We also speak of the prospective jurisdiction of administrative agencies and the necessity for seeking the aid of courts to preserve the status quo or rights pending the completion of an administrative action. See, e.g., Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); Board of Governors of Federal Reserve System v. Transamerica Corp., 184 F.2d 311 (C.A. 9, 1950) cert. denied, 340 U.S. 883 (1940); West India Fruit and Steamship Co. v. Seatrain Lines, 170 F.2d 775 (C.A., 1948); Public Utilities Commission of District of Columbia v. Capital Transit Co., 214 F. 2d 242 (D.C. Cir. 1954). If courts can act to preserve their prospective jurisdiction over such matters as proceedings before administrative agencies and to preserve the jurisdiction of administrative agencies over the subject matters committed to their care, they can and should act to protect their own prospective jurisdiction over unborn children who, when born, are entitled to ask the courts to vindicate their rights to citizenship, e.g., their privileges or immunities as citizens of the United States against state

laws that abridge them as protected by the Fourteenth amendment and their entitlement to all privileges and immunities of citizens of the several states as protected by Section 2 of Article IV.

4. The concept of property utilized in the Due Process Clauses of the Fifth and Fourteenth Amendments has reference primarily to the concept of property in state law. Thus, to the extent that state law of property recognizes that the unborn child has property rights, the Due Process Clause of these Amendments protects the unborn child as a person. Similar protection for the life and liberty of the unborn child cannot rationally be denied under these Amendments.

As demonstrated in Sterling v. Constantin, 287 U.S. 378 (1932), the concept of property contained in the Due Process Clause of the Fourteenth Amendment has primary reference to the law of states under which rights to property are created. The Court observed in this case:

> "The existence and nature of the complainants' rights are not open to question. Their ownership of the oil properties is undisputed." Id. at 396.

The complainants in this case were owners of interests in oil and gas leaseholds in the State of Texas, interests that had been acquired pursuant to the law of property of this state. The same principle must necessarily govern administration of the Due Process Clause of the Fifth Amendment with respect to property rights arising under state law.

The common law in England and in this country has long since recognized the right of an unborn child or foetus to take by inheritance, subject to the event of subsequent birth:

"An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime ...(T)his was the common law rule with respect to both realty and personalty...(A) posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[1]

In Texas a child en ventre sa mere is held included among those children in being at the death of the testatrix who are to take under her will. See James v. James, 174 S.W. 47 (Tex. Civ. App., 1914.) By statute in Texas, when a posthumous child is unprovided for by settlement and pretermitted by his father's last will and testament, he succeeds to the same portion of the father's estate as he would have been entitled if the parent had died intestate.[2]

As early as 1795, English courts recognized the rights of the unborn child in property law. In Doe v. Clarke, 2 H.Bl. 399, 126 Engl Rep. 617 (1795), the court held that the description in a devise to "children living at the time of his (the life tenant's) decease" included unborn children. American courts utilized the same approach. In Hall v. Hancock, 15 Pick, 255 (Mass., 1834, Chief Justice Shaw held that an unborn child fell within the meaning of a bequest to grandchildren "living at ... decease." In the case of La Blue v. Specker, 358 Mich. 358, 100 N. W. 2d 445 (1960), an unborn illegitimate child was held to be a child or "other person" having standing to bring suit under a dram shop act, for the death of his father, which had occurred before the child's birth. The Court stated:

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[1] Atkinson on Wills (2nd ed. 1953) 75

[2] See, Vernon's Annotated Texas Statutes, Probate Code, Section 66.

"For certain purposes, indeed for all beneficial purposes, a child en ventre sa mere is to be considered as born.... It is regarded as in esse for all purposes beneficial to itself, but not to another....Formerly, this rule would not be applied if the child's interests would be injured thereby, ...but, for purpose of the rule against perpetuities such a child is now regarded as a life in being, even though it is prejudiced by being considered as born.... Its civil rights are equally respected at every period of gestation."[1]

It is important in considering the concept of property at this point to remember the admonition Justice Gray addressed to other members of the New York Court of Appeals in his dissent filed in the case of Roberson v. Rochester Folding Box Co., 171 N.Y. 538 (Ct. App. N.Y., 1902). He stated:

"Property is not, necessarily, the thing itself, which is owned; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right."[2]

The majority's forgetting of this fundamental concept of the person as being at the center of even the concept of

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[1] 1 Bouvier, Law Dictionary, p. 1038

[2] Id.

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property led to the rejection of its decision shortly thereafter by the people and the Legislature of the State of New York. (New York Laws, 1903, c. 132, N. Y. Civil Rights Law ss 50, 51.)

Thus, when the state recognizes that the unborn child may take real or personal property under a will or a statute of descent and distribution, it is not only declaring what is "property" that is within the meaning of the Due Process Clause of the Fourteenth Amendment. It is also declaring that the unborn child is a person to be protected with respect to its property right. The very concept of property, as Justice Gray long ago pointed out, is a concept of the person and of the right of the person. It is the state's definition of the person and of the rights of the person relative to property that is referred to by the term "property" in the Due Process Clause of the Fourteenth Amendment.

If the unborn child is a person protected as to its property under the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States, the child must also be a person under the same clauses for the purpose of the protection of its life and liberty. It would be a strange and bizarre doctrine that protected the property of the unborn child under these Amendments, as is clearly the case, but not its life and liberty. As to life, we are dealing with a matter that is less dependent upon the state for its being than property is. Life is the product of natural processes, although with the Founding Fathers many of us may affirm that it is not wholly so, whereas property is wholly the product, as a concept, of legal processes. The life of the person does not depend for its being so much upon the state as the state depends upon the life of the persons composing it. It is for this reason that the Founding Fathers recognized it to be the foundational right to all other rights. It was perhaps not without significance that they mentioned it before "liberty" and "property" in the Fifth Amendment. Thus, if any lesser

right of the unborn child is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, the foundational right to life of the unborn child must also necessarily be protected by them.

In determining upon the propriety of protecting the unborn child as a person, with respect to its life and liberty, under the Due Process Clauses of the Fifth and Fourteenth Amendments and under other constitutional safeguards of the person, this Court should be as guided by decisions of state courts at common law with respect to the protection of the unborn child's life and liberty as it is necessarily controlled by their decisions with respect to the unborn child being a person who may own property when administering the protection of property contained in Due Process Clauses. The Constitution, after the decision in the Erie case, supra, and as applied in the actual administration of the Due Process Clauses, must be taken as at least establishing a principle requiring this Court to give strong consideration, if not a prima facie effect, to state decisional law and statute law in determining who is a person for purposes of the constitutional safeguards of the person. A regard for state decisional and statute law indicates that states have long since determined that the unborn child's liberty and life are to be as much protected at common law and by statutes as the unborn child's property is.

In the area of tort law, the unborn child has come into his own as a person since World War II. In Scott v. McPheeters, 33 Cal.App.2d 629, 92 P. 2d 678 (1939), rehearing denied, 93 P.2d 562 (1939), the court held that a child might sue for injury to her in delivery before birth. The District of Columbia courts reached the same result. Bonbrest v. Kotz, 65 F.Supp 138 (D.D.C. 1946). Since 1946, this result has been generally reached:

> "...(A) series of more than thirty cases, many of them espressly overruling prior holdings, have brought about the most spectacular abrupt reversal of a well-settled rule in the whole history of the

law of torts." [1]

The Supreme Court of Texas in 1967, in overruling a prior holding, likewise held that the parents of a viable child who had been injured in the sixth or seventh month of its mother's pregnancy as a result of the defendant's negligence could recover damages for its death after birth due to these injuries. Leal v. C. C. Pitts Sand and Gravel, Inc. Tex. , 419 S.W.2d 820 (1967). On October 6, 1971, the same court extended the new principle of protection to an unborn child injured prior to its having become viable. Delgado v. Yandell, Tex. , (1971) The majority of jurisdictions now recognize that a wrongful death action may be brought for negligently inflicted injury to the unborn child resulting in its death, whether or not it was viable at the time of the injury, and whether born alive or still born. Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E. 2d 926, 927 (1967).[2]

In the area of family law, the courts have recognized the right of the unborn child as a person to support by his parents. Kyne v. Kyne, 38 Cal.App2d 122, 100 P.2d 506 (1940), involved a suit for support brought by the guardian ad litem of a six month's old unborn child against the natural father. The court held that under Section 29 of the Civil Code the father of an unborn child could be compelled by that child, acting through a guardian ad litem, to support it. This section provided that an unborn child "is to be deemed an existing person", so far as may be necessary for its interests..." The court also

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[1] Prosser on Torts, (3rd ed.,1964) p. 355, 356. Also see, Gordon, The Unborn Plaintiff, 63 Mich. L. Rev. 579 at 627 (1965).

[2] Harper and James, Torts, Sec. 18.3 (1956); David E. Louisell and John T. Noonan, Jr., "Constitutional Balance" in The Morality of Abortion (Harvard Press, 1970) 220 at 226-230.

referred to a provision of the California criminal law having an even broader reach in protecting the unborn child as "an existing person." Section 270 of the California Penal Code, as amended in 1925, St. 1925, p. 544. The Supreme Court of Colorado has recently held that an unborn child is within the concept of "child" utilized in a paternity statute and that a juvenile court may issue temporary orders for support of that child pending adjudication or disposition of the child's case. People v. Estergard, Colo. , 457 P.2d 698 (1969). Otherwise, said the Court, "the father of an unborn child ... (could) evade his responsibility for support by leaving the state at any time prior to the birth of the child."[1]

The unborn child has been recognized as a person to have a right to life that is superior to his mother's right to free exercise of her religion. In Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (C.A. D.C., 1964), cert. den., 377 U.S. 978 (1964), Judge J. Skelly Wright issued, after the District Court for the District of Columbia had refused to do so, an order to a hospital to administer blood transfusions to a mother carrying a seven-month unborn child so far as necessary to save the mother's life, the mother and her husband having refused to permit the transfusions on religious grounds. The Court based his authority for the order upon the lack of right of the parent to forbid the saving of his child's life by action of the state, citing such cases as People ex rel Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, cert. denied, 344 U.S. 824, 73 S.Ct. 24. It also suggested that the state, in this instance the United States, may also be under a corresponding duty to act in behalf of the mother and child:

> "Under the circumstances, it may well be the duty of a court of general jurisdiction, such as the United States District Court for the District of

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[1] Id. at 699.

Columbia, to assume the responsibility of guardianship for her, as for a child, at least to the extent of authorizing treatment to save her life.

"The state, as parens patriae, will not allow a parent to abandon a child, and so it should not allow this most untimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother."[1]

In Raleigh Pitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964) cert. den., 377 U.S. 985 (1964), the Court held that an unborn child was entitled to the Law's protection and thus to obtain a court order directing a blood transfusion for his mother if necessary to save her life or the life of the child. The Court referred to its earlier decision in State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), in which it had held that the concern of the state for the welfare of an infant justified the ordering of blood transfusions for the child notwithstanding the objections of its parents on religious grounds. In that case, it cited the opinion of the Supreme Court of the United States in Prince v. Massachusetts, 321 U.S. 158, 166-167, 64 S.Ct. 438-432.

"Neither rights of religion nor rights of parenthood are beyond limitation. ...The right to practice religion freely does not include liberty to expose...the child...to ill health or death."

The New Jersey Court pointed out that the facts of the case before it:

"clearly evidence a more compelling necessity for the protection of a child's welfare than those in

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[1] Id. at 1008.

Prince." 181 A.2d at 757.

These decisions should be persuasive to this Court that the unborn child should be considered a person for the purpose of administering the protection of the life and liberty of the person provided by the Fifth and Fourteenth Amendments just as other decisions by state courts are controlling upon this Court for the purpose of administering the protection of property of the person provided by these same Amendments.

The result of the argument in subpoint C is that there are numerous parts of the Constitution which protect the unborn child as a person. That the unborn child is so protected in these parts of the Constitution should be persuasive to this Court that the unborn child should be held to be a person within the meaning of any constitutional safeguard of the person that is relevant to protecting its interests.

D. The concept of person must be held as much beyond the power of the state or nation to define, in the sense of determining whether or not some child of human beings is entitled to be treated before the law as a person, as it is beyond the power of the state or nation to define the concept of religion, in the sense of determining whether or not some group is pursuing a religious cause and entitled to solicit support for it, and for the same reasons.

This Court held in Cantwell v. State of Connecticut, 310 U.S. 296 (1940) that the Due Process Clause of the Fourteenth Amendment was violated by a state statute that required a person to obtain a permit as a condition of soliciting support for the perpetuation of his religious views where the official passing upon the permit application was empowered to determine whether the cause for which the solicitation was sought to be done was for a religious cause and to deny the permit if he found the cause was not a religious one.

Speaking for the Court, Justice Roberts stated:

"His (the official's) decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of the liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." 310 U.S. at 305. [parentheses added]

By the Cantwell case, this Court put it completely eyond the authority of the state to define what a reli- ious cause is and to determine in light of that state efinition whether the activities of a given group of per- ons constituted the pursuit of religion or of a religious use and thus whether that group would enjoy the right to rvive or live through the efforts of its members in so- iciting support for perpetuation of its views. The con- pt of religion was by this decision held a concept not bject to definition by the state but rather as a concept ving an integrity and meaning independent of the state d to be respected by it. In effect, the Court held that e Fourteenth Amendment insofar as it contained the pro- ction of the person set out in the First Amendment ainst any "law respecting the establishment of religion, prohibiting the free exercise thereof..." took the finition of the concept of religion out of the hands of e state or nation and elevated it to the level of a con- itutional concept. The Court was not called upon in that se to state what the constitutional concept means.

The recognition of the constitutional immunity and dependence of the concept of religion by this Court was d to be necessary for the protection of the free exer- e of the chosen form of religion by way of giving the edom to act "appropriate definition to preserve the en- cement of that protection." 310 U.S. at 304. The

"appropriate definition" of the freedom to act in the exercise of one's chosen religion was achieved by preventing the state from determining what a religion or a religious cause is and conditioning one's exercise of his religion thereby.

Similarly, if the concept of the "person" contained explicitly or implicitly in numerous safeguards of the person in the Constitution of the United States is one the state or the nation is permitted to define according to majority vote, the state can readily control by the whim of a capricious majority that looks askance upon various types of person, who is entitled to be treated as a "person" within the state or nation. The concept of person utilized in the Constitution is an even more fundamental concept than the Constitutional concepts of "religion", "freedom of speech", "freedom of the press", "right...peacably to assemble, "petition..for a redress of grievances", "citizen", "right to a speedy and public trial", and many others. It is more fundamental as a concept simply because where a being or person is in a position of claiming that he or she is a "person" within the meaning of the constitutional safeguards of the person, the decision upon this claim can conclude that being's or person's right to life and to all the other rights guaranteed to the person.

The argument just made does not tell us what the definition is of the constitutional concept of the person any more than the decision of this Court in the Cantwell case revealed what the definition is of the constitutional concept of "religion". It does tell us that if that definition is necessary, as it seems to be in order to dispose of this case, it must be made in accordance with the constitutional interpretation criteria that this Court has applied in previous cases. It also tells us that no federal court can rationally dispose of the issues in this case without confronting and resolving the issue of whether an unborn child is a person under the constitutional concept of the person. It also tells that if the unborn child is a person within the meaning of the

Constitution then a state has the right to enact a statute seeking to protect the constitutional right to life of the unborn child providing it has done so in a reasonable way.

E. The long continued construction of the Constitution by the Congress and by the Chief Executive as comprehending the unborn child within its concept of the person bind this Court in administering the Constitutional safeguards of the person, particularly the Fourth, Fifth, Seventh, Eighth, Ninth, and Fourteenth Amendments.

This Court has long since recognized that a Congressional construction of the Constitution of the United States through the enactment of statutes or resolutions which is either contemporaneous or long continued is "entitled to the greatest respect."[1] Indeed, the respect accorded a contemporaneous or long continued construction of the Constitution by Congress and followed by the executive department over a period of 73 years was so great that it has been held that construction "fixes the construction to be given its provisions" by this Court so that Congress may not thereafter depart from the construction it has, as an institution, been responsible for creating. Myers v. United States, 272 U. S. 52, 175 (1926).

The Congress of the United States enacted a statute in 1825 which adopting, among others, state criminal laws prohibiting abortion for application within federal enclaves located in the different states. 4 Stat. 115 (March 3, 1825). This statute was modeled upon a section of bill drawn by Mr. Justice Story. Of the latter bill, its distinguished author stated:

"The state courts have not jurisdiction of crimes committed on the high seas, or in places ceded to

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[1] Ex Parte Quirin, 317 U. S., 42 (1942)

the United States. Rapes, arsons, batteries, and a host of other crimes may in these places be now committed with impunity."[1]

The formula proposed and later adopted for dealing with this problem was the following:

> "where the punishment of which offense is not specially provided for by any law of the United States, such offense shall, upon a conviction in any court of the United States having cognizance thereof, be liable to, and receive the same punishment as the laws of the state in which such ...placed, ceded as aforesaid, is situated, provide for the like offense when committed within the body of any county of such state."

The statute came to be called the "Assimilative Crimes Statute." At the time this comprehensive formula was adopted, Congress did not have any law providing specially for the punishment of abortion. However, Connecticut had four years previously enacted an abortion law based upon the English Statute of 1803 (43 Geo. 3, c. 58.) which penalized all forms of abortion whether or not the abortion occurred before the "quickening" of the unborn child. Conn. Stat. Tit. 22 ss14, at 152 (1821). New York added an abortion statute in 1828 (N. Y. Rev. S. Vol. 2, ps 578-579 21 (1836) of the type that became traditional in this country, as was true of Maine in 1840, Ohio in 1841, as well as of Massachusetts and Illinois in 1845 (Mass. St. 1845, c. 27; Ill. R. S., 1845, p. 158, s. 46); of California in 1850 (Stats. 1850, ch. 99, s. 45, p. 233); of Texas in 1854 (Tex. Pen. Code, Arts. 531-536; Texas L. 1854, ch. 49, 58, Texas Penal Code, 1857), Pennsylvania in 1860 (1860, M.L. 382, s. 88), and Colorado in 1861 (L. 1861, p. 296, s. 42), and Virginia in 1848 (L 1847-8, p. 96, ch. 3 §9).[2]

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[1] W.W.Story, The Life and Letters of Joseph Story, Boston, Little & Brown, 1851. Vol. 1, 297.

[2] David Granfield, The Abortion Decision.Garden City Doubleday & Co., 1969. 79.

Since the 1825 Federal Act had been held to apply only to places that had been ceded to the United States, prior to its enactment, United States v. Barney, 5 Blatchf. 294, Fed. Cas. No. 14,524, its coverage was much less than the extent of the problem to which Justice Story had sought to direct it. Thus, in 1866, when congress substantially reenacted the 1825 statute it made the law applicable to "any place which has been or shall hereafter be ceded." (14 Stat. 13, April 5, 1866). The effect of this statute was to extend its coverage to all of the states previously mentioned as well as to all others that theretofore or thereafter enacted the traditional form of abortion statutes. All fifty states eventually proscribed abortion. In all of them abortion was permitted to save the life of the mother. In Colorado and New Mexico only was abortion to prevent serious and permanent bodily injury to the mother permitted, and only in Alabama, Oregon, and Massachusetts was abortion to protect the health of the mother permitted.

The policy of The Assimilative Crimes statute has been continuously in effect in this country since 1825 through various reenactments, see United States v. Sharpnack, 355 U.S. 286 at 291 (1958), and is now codified in the Revised Criminal Code as 18 U.S.C. s 13. The effect of the 1825 statute and its subsequent reenactments was, prior to 1967, to adopt a substantially uniform state law against abortion for application in federal enclaves. All fifty states had proscribed abortion. In all of them abortion was permitted in order to save the life of the mother. Only in Colorado and New Mexico was abortion permitted to prevent serious and permanent injury to the mother, and only in Alabama, Oregon, and Massachusetts was it permitted to protect the health of the mother.[1]

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[1] See David Granfield, Id. at 79.

Thus, through the Assimilative Crimes Statute of 1825, the United States initiated a policy that made enforceable a substantially uniform policy directed against abortion in federal enclaves located within the fifty states of the nation. That policy by 1967 had been in existence for a total of 142 years. It was a policy, like that of the state criminal law for whose application it proveded in federal enclaves, that involved.

> "recognition of the human dignity of the unborn and the protection of unborn life by criminal sanctions." [1]

This congressional protection of the life of the unborn extending over a period of 142 years without variation under the Assimilative Crimes Statute constitutes one of the clearest legislative constructions of the appropriate use of its powers to protect federal interests within federal enclaves under the Constitution of the United States. It is a recognition that the unborn child is a human person, under the constitution, and that Congress has the authority under the 17th clause of Article I, Section 8 to provide for the protection of its right to life. The reenactment of the original Assimilative Crimes Statute on April 5, 1866, during the period of Congressional consideration of various civil rights measures and of the proposed Fourteenth Amendment, in light of the substantial number of statutes directed against abortion that had been enacted since 1825 suggests that the Congress saw this statute as, in part, a civil rights statute for the protection of the security of the person. In any event, this legislative construction of the Constitution was continued for a period of nearly double the 73 years of another legislative construction which this Court held, as previously noted, "fixes the construction" to be given its provisions."

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[1] David Granfield, Id. at 81.

Surely, if Congress and the Court are not free after 73 years of a consistent Congressional construction of the Constitution to change that Construction, several state governments are not free by enactment of unlimited or substantially unlimited abortion laws to change a congressional construction of 142 years standing that the unborn child is a human person deserving protection of its right to life in the exercise of the power to provide exclusive legislation for places ceded by the states to the United States. The 142 year old construction should surely "fix the construction" by Congress for the Congress, the State Legislatures, and this Court that the unborn child is a person within the meaning of the Constitution of the United States.

Congress and the Chief Executive have given numerous long standing as well as recent constructions of the Constitution recognizing the unborn child to be a person deserving protection by the United States for its life and health.

Prior to the enactment of the Uniformed Services Dependents' Medical Care Act of 1956 (70 Stat. 250, Title 10, U.S.C. ss 1071-1085), the dependent wives and children, both born and unborn, had been receiving medical care from the uniformed services for over 100 or more years despite the fact that there was no specific statutory authority for rendering this care until 1884 in the case of the United States Army and 1943 in the case of the United States Navy. Congressional Record Statement of Representative P. Kilday of Texas, Congressional Record, Vol. 102, 3847 (March 2, 1956). Medical care was provided dependents of the U.S. Navy and U.S. Marine Corps by the Navy, of members of the Coast Guard, Public Health Service, and Coast and Geordetic Survey by the Public Health Service, and of the U.S. Army and Air Force Personnel by the Army. These statutes gave virtually unlimited discretion to the Secretaries of the Army, Navy, Air Force, and the Secretary of Health, Education, and Welfare in providing medical care to members of these services and their wives and children.

The Uniformed Services Dependents' Medical Care Act of 1956 was designed to continue the long standing policy of providing medical care to dependent wives and children, both born and unborn, of members of the Uniformed services, but also to improve greatly the quality of medical care available, to make it more uniform in nature, and to make more readily available to the more than 40 per cent of all dependents who had not been able to take advantage of it due to the "shortage of military doctors, overcrowding of military medical facilities, (and the fact that)...so many of the military dependents are located where they cannot take advantage of existing military care." Congressional Record. Vol. 102, 3851-3853 (March 2, 1956).In its section 1072 (Title 10, USC) the term dependent was defined to include:

> "an unmarried legitimate child who has not passed his twenty-first birthday ...(or) is incapable of self-support because of mental or physical incapacity."

Section 1077 of Title 10 U.S.C. provided that only the kinds of health care specified in that section were authorized to be provided dependents of a member of a uniformed service. One of the authorized kinds of health care was "maternity and infant care." This phrase was further defined in joint regulations issued by the Secretaries of Defense and Health, Education, and Welfare who were required under Section 1076 to issue these regulations in order to prescribe in greater detain the medical care available under Section 1077. Joint regulations issued under the Act provided, by way of further definition of the statutory phrase "maternity and infant care", that the phrase include:

> "prenatal and postnatal care, and routine care and examination of the newborn infant." Title 32, Section 577.64 (e) (7).

Neither the Act nor the joint regulations issued under them referred to or authorized the latter but rather referred to the following health benefits, among others

"Drugs: Prescriptions written by either uniformed services or civilian physicians will be filled at uniformed services facilities...."

Family planning services and supplies, including counseling and guidance. These services and supplies will be provided in accordance with sound medical practice to any eligible dependent upon request. Title 32, Section 577.64(e)(3),(9).

The Congress that enacted this Act obviously was concerned with the welfare of mothers and unborn children. Congressman Paul Kilday, Chairman of the House Committee on Armed Forces Subcommittee No. 2 which conducted hearings on H.R. 9429 which became the new Act, made statements that typify the congressional mind in 1956 in discussing the right of dependent wives and their unborn children to obtain medical care under the statute from private physicians in private hospitals:

"A woman (military member's wife) expecting a baby has a number of friends who have recently had babies who knew the doctor who took care of them, and they knew everything came out all right and they naturally want to go to that doctor in the community...If they (military personnel) do not have quarters on the base, they are out in the civilian community where they meet the people and hear these things talked about.

"...the woman expecting her baby might go home in the sixth month of pregnancy. Most Texans do that. They want their kids born in Texas and they go home." Hearings before Committee on Armed Services, U.S. House of Representatives, Comm. Rep. 53, 84th Cong., 2nd Sess. 1956 6029, 6034.

Clearly, at this point, Congressman Kilday had reference to a new feature of the bill that would permit a serviceman's dependent wife to obtain medical care for herself and her child in a private hospital under the cognizance of state law. His statement not only reflects the concern of the legislators for providing medical care for the wife and the unborn child but also for the provision of this care in the context of a private hospital by a private physician subject to and controlled by the state law of abortion. In the particular example he gave, that law was the one now being challenged in this case. Congress at the time it enacted the Uniformed Services Dependents' Medical Care Act in 1956 was reaffirming its 100 year commitment to respect for the unborn child as a human person and seeking to provide for improved health care to be made available to it and to its mother. Having indicated this concern with the unborn child as a dependent entitled to medical or health care, Congress drove home the point by providing that no dependent should be denied equal opportunity for that care through requiring the Secretaries of Defense and Health, Education, and Welfare to issue joint regulations;

> "to assure that dependents entitled to medical or dental care under this section will not be denied equal opportunity for that care because the facility concerned is that of a uniformed service other than that of the member."[1]

Throughout the history of the administration of the 1956 Act the Uniformed Services continued to give effect to the Assimilative Crimes Statute policy of respecting the state law on abortion in federal enclaves. In July 22, 1970, the Surgeons General of the Departments of the Army, Navy, and Air Force joined in a memorandum addressed to the Assistant Secretary of Defense (Health and Environment) taking the position that

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[1]Title 10, S 1076(d), U.S.C.

"Abortions will be performed within the limits of local state laws."

On July 31, 1970 the Assistant Secretary of Defense, Louis M. Rousselot, M.D., F.A.C.S. issued a memorandum by way of reply to the joint memorandum of the Surgeons General of the Armed Forces stating, without citation of authority for his directive, disapproval of the above limitation on performance of abortions. He referred to his Memorandum of July 16, 1970, which also was without citation of authority, directing that

> "Pregnancies may be terminated in military medical facilities when medically indicated or for reasons involving mental health and subject to the availability of space and facilities and the capabilities of the medical staff."

There was no authorization for this action either in the 1956 Act or any joint regulation issued by the Secretaries of Defense and Health, Education, and Welfare as required by that Act with respect to forms of health care to be available to dependents.

After the implementation of this new "memorandum" policy on abortion by the Secretary of the Air Force by Air Force Regulation 160-13 and its application in Texas at the Willford Hall Air Force Base Medical Center, Lackland Air Force Base located in San Antonio, Texas, and the destruction of more than 100 unborn children without compliance with the Texas law of abortion, the case of Paul B. Haring v. Commander Willford Hall Air Force Base, No. SA 71 CA 11 was instituted on January 15, 1971, before the United States District Court for the Western District of Texas. This case challenged the validity of these abortions and of the regulation under which they were being performed by virtue of Fifth, Eighth,

and Ninth Amendments to the Constitution of the United States.[1] A temporary restraining order against further abortion under the challenged regulation by the Court was, on Defendants' Motion to Dismiss, permitted to expire without extension as requested by the Plaintiff and the Defendants' Motion was granted on the ground that the plaintiff had not satisfied the Court on the legal question of having sufficient standing to bring the suit. The case is now on appeal before the Fifth Circuit Court of Appeals, docketed as No. 71-1404.

On April 3, 1971, following institution of and the decision in the Haring case, supra, the President of the United States, Richard M. Nixon, issued a directive overturning the "memorandum policy" of the Assistant Secretary for Defense (Health and Environment) and the Air Force Regulation 160-12. He stated:

> "I have directed that the policy on abortions at American military bases in the United States be made to correspond with the laws of the states where those bases are located. If the laws in a particular state restrict abortions, the rule at the military base hospitals are to correspond to that law."...
>
> "From personal and religious beliefs I consider abortions an unacceptable form of population control. Further, unrestricted abortion policies, or abortion on demand, I cannot square with my personal belief in the sanctity of human life-including the life of the yet unborn. For, surely, the unborn have rights also, recognized in law, recognized even in principles expounded by the United Nations.

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[1] U.S.C. Title 42, Secs. 1981 and 1988; USC., Title 10, Section 1077; and Title 18, Sec. 13.

"Ours is a nation with a Judeo-Christian heritage. It is also a nation with serious social problems-problems of malnutrition, of broken homes, of poverty and of delinquency. But none of these problems justifies such a solution.

"A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to the unwanted children of its own, as it has done for the unwanted millions of other lands."[1]

The action of the President caused the health policy of the Department of the Air Force to be returned after a brief, unauthorized departure therefrom, to the traditional administration of health care by the armed forces of the United States in behalf of unborn children, a policy that had been unbroken in its administration between approximately 1856 and 1970, a total of 114 years. This, too, constitutes a long-continued Congressional and Executive construction of the Constitution of the United States as authorizing the exercise of federal power to protect the unborn child as a person in its right to life.

Congress has consistently between 1873 and 1971 maintained a vigorous policy against abortion by statutes specifically directed at the practice. One of these statutes, the District of Columbia Code provision section 22-201, was recently examined by this Court in United States v. Vuitch, 402 U. S. 62 (1971). The Court held the statute, originally enacted in 1901, was not unconstitutionally vague insofar as it excepted from its coverage an abortion "for the preservation of the mother's life or health".

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[1]The New York Times, Sunday, April 4, 1971, p. 1.

Congress has since 1873 prohibited the importation of any drug, medicine, or article for causing unlawful abortion. 17 Stat. 598-599 (March 3, 1873). It has also since 1876 prohibited the use of the mails for the support of operations to effectuate an abortion through the mailing of information concerning these operations. 19 Stat. 90 (July 12, 1876). These two laws are now contained in the United States Code, Title 18, sec. 1461 and Title 19, sec. 1305, respectively. When these laws were modified on January 8, 1971, so as to strike their coverage of the same matter relative to "the prevention of conception", Congress continued intact their policy relative to "unlawful abortion". Pub. Law 91-662. Thus, for nearly a hundred years Congress has directed two major statutes against vital avenues for effectuating "unlawful abortions" in areas subject to exclusive federal regulation. The Court of Appeals for the Seventh Circuit in Bours v. United States, 22 Fed. 960 (C.A. 7, 1915) held that the word "abortion", as used in the predecessor to Title 19, section 1305, U.S.C.,

> "must be taken in its general medical sense. ... Therefore a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position. If he uses the mails to give information that he elects, intends, is willing to perform abortions for destroying life, he is guilty, irrespective of whether he has expressly or impliedly bound himself to operate."[1]

Thus, for nearly a hundred years, Congress has directed two major statutes against vital avenues for effectuating "unlawful abortions", the latter being construed to mean any abortion not performed due to the necessity of an operation to save life. This action in regulating the use of the mails and the importation of goods into this

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[1] Id. at 964.

country constitutes a third long-continued construction by Congress that the unborn child is a person within the meaning of the Constitution having a right to life which Congress has the authority to act to protect.

A more recent construction of the Constitution by Congress is represented by the Federal Tort Claims Act, Title 28, Sections 2671 et seq., U.S.C., which was enacted in 1948. This act gives the unborn child the right to recover for injuries inflicted upon them as a result of the negligent acts of federal officers and employees generally and of the uniformed services, including physicians when the latter are rendering medical care to them and to their mothers. In Sox v. United States, 187 F.Supp. 465 (D.C.S.C., 1960) the Government stipulated that it was liable for any injuries sustained as a result of the negligence of a military policeman by an unborn child during the sixth month of its mother's pregnancy and the child recovered the sum of $260,000 for those injuries which left her "completely helpless and entirely dependent upon others". In Rewis v. United States, 369 F. (C.A. 5, 1966) the Court held that in a tort action brought by the parents of a child for causing her wrongful death as a dependent treated by an Air Force Medical Officer that it was not necessary for the plaintiffs to adduce specific testimony, as the trial court had rules was necessary, that "to a reasonable degree of medical certainty" the child's life could have been saved. This child was fifteen months old. These cases indicate that Congress is as concerned with protecting the unborn child as a person as it is with protecting other children from injuries inflicted by the negligent action of its own officers and employees.

Even more recently, Congress has show its concern with the efforts of some states to promote family planning by abortion. Section 1008 of the Family Planning Services and Population Research Act of 1870, signed by the President on December 24, 1970, provided:

"None of the funds appropriated under this title

shall be used in programs where abortion is a method of family planning." Pub. Law 91-572, 84 Stat. 1504.

Thus, from 1825 to the present Congress has created not less than six major statutory policies all of which are directed toward treating the unborn child as a person and protecting its right to life and to freedom from invasion of its bodily integrity or privacy. All of these policies are still in force today. Some of the oldest of these have been reaffirmed as late as 1971. Others are newer policies that widen the area of protection for the unborn child such as those concerned with health care and redress for tortious invasions of its interests. One of these policies, that of health care for dependents of uniformed services' personnel originated in the Executive Branch of government and was later codified by an act of Congress. Taken together, this long-continued Congressional and Executive construction of the Constitution as contemplating the unborn child as a person and as authorizing these branches of government to provide protection of the life and other interests of the unborn child would seem to foreclose this Court from taking any other view in construing the constitutional safeguards of the person.

The fact that since 1967 several states have enacted abortion laws in basic conflict with this long-standing federal policy against abortion except for the necessity of preserving the life or avoiding a grave peril to the health of the mother does not, by operation of the federal Assimilative Crimes Statute, supra, undercut that policy.

This Court in United States v. Sharpnack, specifically reserved decision upon the point of the effect of the Assimilative Crimes Act

> "where an assimilated state law conflicts with a specific federal criminal statute, cf. Williams

v. United States, 327 U.S. 711, or with a federal policy. Cf. Johnson v. Yellow Cab., 321 U.S. 383; Stewart & Co. v. Sadrakula, 309 U.S. 94; Hunt v. United States, 278 U.S. 96; Air Terminal Services, Inc. v. Rentzel, 81 F. Supp. 611; Oklahoma City v. Sanders, 94 F. 2d 323."[1]

The position of amicus is that because of the long-standing and current pervasive federal policy against abortion as evidence in six major federal statutory areas and in the Constitution itself the Assimilative Crimes Statute does not operate to assimilate a state statute going beyond the grounds for abortion approved in federal statutes and policy.

F. Judged from the standpoint of what it is in itself, the unborn child is a person and justice demands that government recognize this fact and treat the unborn child for what it is.

Up to this point, the argumentation of amicus has been directed to application of the well-established criteria for interpretation of the Constitution. The final argument that the unborn child is a person focuses upon what the unborn child is in itself. The relevance of this argumentation is that all law, and especially constitutional law, is a method of accomplishing "justice according to the law". For this reason, it is important to determine what the child is itself. If the unborn child must be acknowledged to be a person, the justice demands that this Court construe the Constitution, especially with regard to the constitutional safeguards of the person, so that all government, both state and federal, is required to treat the unborn child for what it is. Justice has always been recognized to involve action, whether by an individual or private or public group, that accords to

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[1] Id. at note 9, p. 296.

an other or others what is their due, what is due is what respects the dignity and needs of the person upon whom the action bears.

The classic definition of the person is that provided by St. Thomas Aquinas in his Summa Theologica. He defined the person as being "the individual substance of a rational nature."[1] By the notion of "individual substance" Aquinas meant that the person has an existence that is peculiar to itself and different and distinct from the existence of anything else, an existence that is not a part of the existence of another but an existence which belongs to it alone: e.g. we refer to "this particular man". By "rational nature" Aquinas had in mind "a reality of human nature. With reference to human being, the reality of human nature is the nature or principle within man that moves us to recognize man as being a different kind of being from other animals. Aquinas had in mind by this principle the cognitive and appetitive rational powers of man, which he discusses in the first part of the second part of his principal work.[2]

The unborn child at every stage of its development satisfies sufficiently the concept of the person. The unborn child is an individual substance, differing from its mother and having a life that is remarkably separate from, although obviously dependent upon, its environment even as the child who has just been born and

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[1]Basic Writings of St. Thomas Aquinas. New York: Random House, 1945. Vol. 1, p. 291 (Part I, Question XXIX, Article I).

[2]Part II-I, Questions VI-XVII, Summa Theologica: Basic Writings of St. Thomas Aquinas Id. Vol. II. pp. 225-316.

man in all his stages is dependent upon his physical and social environment. The unborn child also possesses a rational nature in the sense that all that is to be present in him when born is already formed at an early period in the womb. Professor R. Ashley Montagu of Columbia University has referred to this latter in saying:

> "The basic fact is simple: Life begins, not at birth, but at conception.
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> "This means that a developing child is alive, not only in the sense that he is composed of living tissue, but also in the sense that from the moment of conception, things happen to him, even though he may be only two weeks old, and he looks more like a creature from another world than a human being--he reacts. In spite of his newness and his appearance, he is a living striving human being from the very beginning. [1]

It is undisputed that the conceptus, or new fetus, possesses at the moment of its formation the so-called genetic code, the transmitter of all the potentialities that make men human, something that is not present in either their spermatoozoon or ovum. [2]

> "Thus it might be said that in all essential respects the individual is whoever he is going to become from the moment of impregnation. He already is this while not knowing this or anything else. Thereafter, his subsequent development cannot be described as his becoming someone he now is not. It can only be described as

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[1] R. Ashley Montagu, Life Before Birth, New York: New American Library, 1964, P. 2

[2] Frederick J. Gottleib, Developmental Genetics (1966) p. 17.

a process of achieving, a process of becoming the one he already is. Genetics teaches that we were from the beginning what we essentially still are in every cell and in every generally human attribute and in every individual attribute." 1

With respect to the separateness of the unborn child from its mother, it has been observed:

"The child may be parasitic and dependent, but it is a functioning unit, an independent life... However visceral may be its temporary residence, however dependent it may be before birth--and for some years after birth--it is a living being, with its separate growth and development, with its separate nervous system and blood circulation, with its own skeleton and musculature, its brain and hearing and vital organs." 2

Following the implantation of the fertilized egg in the uterus seven or eight days after ovulation, the development into the human fetus and embryo is extraordinarily rapid. This development has been described by Dr. Andre Hellegers as follows:

"After this second week of pregnancy the zygote rapidly becomes more complex and is now called the embryo. Somewhere between the third and fourth week the differentiation of the embryo will have been sufficient for heart pumping to occur, although the heart will by no means yet have reached its final configuration. At the

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[1]Paul Ramsey, "Reference Points in Deciding About Abortion" in The Morality of Abortion: Legal and Historical Perspectives, John T. Noonan, Jr., Ed (Harvard Press, 1970) p. 66.

[2]David Granfield, The Abortion Decision, Garden City, Doubleday & Co., 1969, p.25.

end of six weeks all of the internal organs of the fetus will be present, but as yet in a rudimentary stage. The blood vessels leading from the heart will have been fully deployed, although they too will continue to grow in size with growth of the fetus. By the end of seven weeks tickling of the mouth and nose of the developing embryo with a hair will cause it to flex its neck, while at the end of eight weeks there will be readable electrical activity coming from the brain. The meaning of the activity cannot be interpreted. By now also the fingers and toes will be fully recognizable. Sometime between the ninth and tenth week local reflexes appear such as swallowing, squinting, and tongue retraction. By the tenth week spontaneous movement is seen, independent of stimulation. By the eleventh week thumb-sucking has been observed and X rays of the fetus at this time show clear details of the skeleton. After twelve weeks the fetus, now 3-1/2 inches in size, will have completed its brain structure, although growth of course will continue. By this time also it has become possible to pick up the fetal heart by modern electrocardiographic techniques, via the mother."[1]

Dr. H.M.I. Liley, the pioneer of the medical science concerning the human fetus, which is called Fetology, has recently written concerning his observations of the unborn child through closed circuit ex-ray television:

"The fluid that surrounds the human fetus at 3, 4, 5 and 6 months is essential to both its growth and its grace. The unborn's structure at this

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[1]Dr. Andre Hellegers, "Fetal Development," Theological Studies, Vol. 31, No. 1 (March, 1970)

> early stage is highly liquid, and although his organs have developed...(t)he head, housing the miraculous brain, is quite large in proportion to the remainder of the body and the limbs are still relatively small. ...(H)e is quite beautiful and perfect in his fashion, active and graceful. He is neither an acquiescent vegetable nor a witless tadpole as some have conceived him to be in the past, but rather a tiny human being as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."[1]

An eminent child psychologist concluded as early as thirty years ago that the development of the human fetus reflects a mental growth as early as the fourth week.[2] In the sixth to seventh weeks, the nerves and muscles of the unborn child work together for the first time.[3] By eight and a half weeks the child's eyelids and palms of the hands become sensitive to touch.[4] By the end of the twelfth week, each unborn child shows a distinct individuality in his behavior due to the difference in inherited muscle structure from one child to the next. His facial expressions for this reason are already similar to the facial expressions of his parents.[5] By the end of

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[1]H.M.I. Liley and B.F. Day, Modern Motherhood: Pregnancy, Childbirth, and the Newborn Baby, New York: Random House (1967) pp. 26-27.

[2]Arnold Gesell, The First Five Years of Life, New York: Harper Bros. (1940) 11.

[3]Leslie B. Arey, Development Anatomy, Philadelphia: W.B. Saunders Co. (1954) II, VI.

[4]G.L. Flannagan, The First Nine Months of Life, Simon and Shuster (1962).

[5]Arnold Gesell, Embryology of Behavior, Harper Bros. (1945) Ch. IV-VI, X.

the twelfth week, the child can also kick his legs, turn his feet, curl and fan his toes, make a fist, move his thumb, bend his wrist, turn his head, squint, frown, open his mouth, press his lips tightly together.[1] At this point also "we may assert that the organization of his psycho-somatic self is now well under way."[2] From the twelfth to the sixteenth week, the child grows very rapidly, his weight increasing six times and his height to eight or ten inches as a result of his consumption of oxygen and food received from his mother through the placental attachment which is part of the child.[3]

In the fifth month, the baby's weight increases to one pound and his height to one foot. Hair begins to grow on his head, eyebrows, and eyes, his skeleton hardens, and his muscles become much stronger.[4] The baby sleeps and wakes just as it does after birth.[5] The child

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[1]Davenport Hooker, The Prenatal Origin of Behavior, University of Kansas Press (1952).

[2]Arnold Gesell, The First Five Years of Life, New York: Harper Bros. (1940) 65.

[3]L.M. Hellman, et al: "Growth and Development of the Human Fetus Prior to the 20th Week of Gestation," Amer. J. Obstetrics and Gynecology, Vol. 103, No. 6 (Mar. 15, 1969) pp. 789-800 and Bradley M. Patten, Human Embryology, 3d ed. New York: McGraw-Hill (1968), Ch. VII.

[4]Arey, Supra, Ch. II, VI.

[5]Petre-Quadens, O. et al.: "Sleep in Pregnancy: Evidence of Fetal Sleep Characteristics," J. Neurologic Science, Vol. 4, (May-June, 1967), pp. 600-605.

hears and recognizes his mother's voice.[1]

In the sixth month, the child develops a strong muscular grip with his hands, starts to breathe regularly, and can maintain respiratory response for twenty-four hours if born prematurely.[2] He has about a 10 per cent chance of surviving at this point.[3]

The human fetus or unborn child is just as much a patient of the physician as is the mother.[4] With new optical equipment, a physician can look at the amniotic fluid through the cervical canal and predict life-threatening problems that are reflected by a change in the fluid's color and turbidity.[5] The blood of an RH unborn baby can now be exchanged through use of a new image intensifier X-ray equipment and the placement of a needle through the abdominal wall of the mother into the abdominal cavity of the child. This not only makes it possible to save the life of the child but it also reveals that the child experiences pain and protests it just as violently as a baby in a crib and for this reason must be given sedation and pain relieving medication.[6] Recent

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[1]Wood, Carl. "Weightlessness: Its Implications for the Human Fetus," Obstetrics and Gynecology of the British Commonwealth. Vol. 77 (1970) pp. 333-336; Albert W. Liley, "Aukland MD to Measure Light and Sound Inside Uterus," Medical Tribune Report, May 26, 1969.

[2]Flannagan, Supra.

[3]Andre Helligers, National Symposium on Abortion, May 15, 1970, Prudential Plaza Auditorium, Chicago, Ill.

[4]Henry, G. R. "The Role of Amnioscopy in the Prevention of Ante Partum Hypoxia of the Fetus," J. of Obstetrics and Gynecology of the British Commonwealth, Vol. 76 (1969 pp. 790-794.

[5]Liley and Day, Supra, p. 50.

work indicates that the unborn child who is diagnosed as failing to get adequate nutrition may be fed by the physician through introducing nutrients into the amniotic fluid being swallowed by the child.[1] The amniotic fluid surrounding the unborn child offers the physician a convenient and assessable fluid that he can now test in order to diagnose a long list of diseases, just as he tests the urine and blood of his adult patients.[2] Some of these diseases can be treated before birth.[3] The new science has now developed to the point that the fetus can now be partially delivered and, after giving it an exchange blood transfusion, the surgeon can return the unborn child to the amniotic cavity so that it can continue its intrauterine growth. This development during the past eight years indicates that "surgery on the fetus in utero is quite feasible, even in early pregnancy" and that "(p)renatal surgery may soon be tried against a variety of crippling or fatal ills that defy postnatal treatment."[4]

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[1]Sevilla, Rafael M., "Oral Feeding of Human Fetus, a Possibility," JAMA, May 4, 1970, pp. 713-717.

[2]O'Doherty, N., "Prenatal Treatment of Adrenal Insufficiency," The Lancet, No. 29 (1969) pp. 1194-1195

[3]E.O. Horger, II and A.L. Hutchinson, Diagnostic Use of Amniotic Fluid," J. Pediatrics, Vol. 75, No. 3, pp. 503-508.

[4]"Fetology: The Smallest Patients," The Sciences (The New York Academy of Sciences, October, 1968) pp. 159-163.

The scientific data just reviewed concerning the unborn child of human beings from the moment of and after its conception emphasizes its individuality; its functional unity; its independent life; its striving, developing nature; its containment of all that it will ever be essentially in every cell, in every generally human attribute, and in every individual attribute; its mental growth from as early as the fourth week after conception; its ability to move its legs, feet, toes, fists, thumbs, head, and lips by the twelfth week of its existence; its ability to hear and recognize its mother's voice in the fifth month of its existence; and its 10 per cent chance of surviving if it is born prematurely in the sixth month. Other scientific data shows the growing ability of medicine to diagnose and to treat successfully the diseases of the unborn child even to the extent of removing the child for the purpose of surgery and then placing it back into its mother's womb.

Surely the above scientific data warrants this Court in taking the position that the unborn child is "an individual substance of a rational nature." The characteristics of the unborn child which this data reveals amply supports the judgment long since universally made by our Founding Fathers and their citizen peers by the Common Law, by the philosophers of natural rights, by adherents to religious beliefs at the time the Constitution was adopted that the unborn child is a human person, a judgment since concurred in by long continued construction of the Constitution by the Congress and by the Chief Executive over a period of 146 years.

Certainly, at a minimun, the above scientific data plus the argumentation set forth previously in this point should move this Court to say that a prima facie case has been made that the unborn child is a human person. This Court has previously known when to construct rules of substantive law that employ the prima facie concept, as in United States v. Philadelphia National Bank, 374 U.S. 321 (1963). In that case, this Court was concerned with lightening the burden of proving under Section 7 of the Clayton Antitrust Act (15 U.S.C. s. 18) that the effect

of a merger "may be substantially to lessen competition" in a relevant market. It created a test that if satisfied by the facts surrounding the particular merger would operate to establish that the merger was prima facie one the effect of which may be substantially lessened competition in the relevant market. The test was developed by this Court in light of what it characterizes as an "intense congressional concern with the trend toward concentration." Id. at 363. This Court selected certain percentages relative to market share resulting from a merger from which it would conclude that the merger was prima facie one that might produce the prohibited economic effect. It justified its selection of these percentages in light of prior adjudications under other phases of antitrust law. Applying these prima facie substantive rules in the Philadelphia Bank case, this Court observed:

> "There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages." Id. at 366.

What this Court did in the Philadelphia Bank case is entirely instructive for what it should do in this case. Amicus has clearly demonstrated the considerations that warrant this Court in concluding that the unborn child is or at least prima facie is a human person within the meaning of the Constitution of the United States entitled to invoke or have invoked in its behalf by the state the constitutional safeguards of the person. If this Court is unwilling to hold that the unborn child is a human person, it should at least hold that prima facie it is a human person and that the burden should shift, for constitutional purposes, to those who assert the unborn child is not a human person to demonstrate that proposition. In record of this case and in the briefs of appellants there is nothing to rebut many considerations that argue so strongly in favor of treating the unborn child as a human person within the meaning of the Constitution. In fact, the appellants never addressed themselves to this point in any substantial way.

If this Court found it advisable to construct substantive rules employing the "prima facie" concept so as to put the burden upon those who have merged elements of an industry to demonstrate that they are not what these substantive rules indicate they are, surely it is advisable for this Court to construct substantive rules employing the "prima facie" concept so as to put the burden upon those who challenge the existence of the quality of person in the unborn child to show that that child is not a person. It must surely be advisable for this Court to do at least this much in view of the consequences for the unborn child of invalidating the state law of abortion that protects its life. Surely, the views of the Founding Fathers and their citizen peers, the Common Law, the philosophers of natural rights, and adherents to religious beliefs at the time the Constitution was founded plus the long continued construction of the Constitution by the Congress and the Chief Executive concerning the unborn child as a person within the meaning of the Constitution manifest a very "intense...concern" with preventing destruction of the unborn child and promoting its interests. Surely, the prior decisions of this Court concerning the law that is applicable as the rule for decision by federal courts in diversity cases alone warrants such an approach.

We need not and should not confine our analysis to the view of Americans or Englishmen, either historically or currently, concerning whether the unborn child should be viewed as a human person. In 1959 the United Nations adopted a "Declaration of the Rights of the Child" which constituted a supplement to its "Universal Declaration of Human Rights." Its preamble stated the reason for the supplementary declaration as being that

> "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." G.A. Res. 1836, 14 U.N. GAOR Supp. 16 at 19, U.N. Doc. A/4354 (1959).

In elaborating the rights of the child, the United Nations took the position that it should be protected against all forms of neglect cruelty and exploitation, enabled to grow and develop in health, and have provided both to

im and to his mother,...adequate prenatal and postnatal care." General Assembly of the United Nations, "Declaration of the Rights of the Child."[1]

The result of the argument in subpoint F is that there is extraordinarily sound ground for holding that the unborn child is, when considered from the standpoint of what he is, in himself, a person and, in justice, entitled to be treated for what he is by this Court in administering the constitutional safeguards of that person. A consideration of modern scientific data concerning the unborn child confirms that he possesses the qualities or characteristics that philosophy has long since established as the hallmarks of the human person: "an individual substance of rational nature." This data in relation to the classic philosophic definition of the person serve to confirm the view taken by various significant sources at the time of the adoption of the Constitution; by the Congress and The Chief Executive in their long-continued construction of the Constitution; by the definition given to the concept of property in the Fifth and Fourteenth Amendments by this Court; by the construction given to Article III by this Court with respect to the rule for decision in diversity cases; by this Court's recognition of the reasonable authority of the State to protect the life and health of children; by this Court's placing of fundamental concepts, such as religion, beyond the authority of the State or Nation to define; by the State's common and statute law recognition of the unborn child as a person; and by the United Nations in its "Declaration of the Rights of the Child.

The argument under Point I would seem overwhelmingly to require this Court to hold the unborn child is a person within the protection of the Constitution. But, if amicus is wrong in this, that argument at the minimum would seem to require this Court to note that it establishes a prima facie case for holding the unborn child to be a person and is sufficient to put the burden upon the appellents which they have in no respect discharged either before the lower court or this Court, of demonstrating that the unborn child is not a person.

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[1] Official Records, pp. 19-20.

POINT TWO

THE UNBORN CHILD BEING A PERSON AND HAVING THE RIGHT TO LIFE WITHIN THE MEANING OF THE CONSTITUTIONAL SAFEGUARDS OF THE PERSON, THE STATE HAS THE DUTY OR THE RIGHT UNDER THE CONSTITUTION TO PROTECT THE LIFE OF THAT CHILD REASONABLY VIS-A-VIS ITS SINGLE MOTHER OR MARRIED PARENTS WHO DESIRE TO TERMINATE ITS LIFE. THE STATE OF TEXAS IN PROVIDING THAT ALL ABORTIONS PERFORMED OR PROCURED BY A PERSON FOR A PREGNANT WOMAN WITH HER CONSENT THROUGH ADMINISTRATION OF ANY MEANS WHATEVER IS A FELONY EXCEPT SUCH AN ABORTION PROCURED OR ATTEMPTED BY MEDICAL ADVICE FOR THE PURPOSE OF SAVING THE LIFE OF THE MOTHER HAS REASONABLY ACTED TO PROTECT THE RIGHT TO LIFE OF THE UNBORN CHILD WITHOUT UNREASONABLY AFFECTING THE RIGHTS OF ITS SINGLE MOTHER OR MARRIED PARENTS.

A. The state is faced with a difficult decision-making problem in resolving the correlative rights of the unborn child as a person and of its single mother or married parents, and its decision to protect the life of the unborn child through an abortion statute should be allowed to stand if it is a reasonable decision.

Once it is determined that the unborn child is a person within the meaning of the constitutional safeguards of the person, the state is no longer capable of standing neutrally by with respect to the treatment of the unborn child by its single mother, its married parents, or by a physician employed by them to destroy its life. This proposition is even more obviously true once the state has acted, as all states have long since done and all still do in one or more respects, to protect the life and other interests of the unborn child either in the civil law or the criminal law or, as is usually the case, in both areas. Because the unborn child is a person, the state is faced with the question of the extent to which it is required to protect the life and other interests of that person with reference to the due process and equal protection concepts as well as other constitutional safeguards of the person.

It must consider that, apart from giving permission to others to take the life of the unborn child being considered as state action in view of its prior action which may be tested as to its constitutional validity, such a permission will extend to agents and employees of the state in many circumstances so that state action will be involved directly with the carrying out of such a policy. The state must also consider what it may or should reasonably do to give effect to the desires of its citizens relative to the protection of the life and other interests of the unborn child and of the interests of the state in that child.

This Court has had occasion to consider the rights of parents vis-a-vis their children in a challenge to the constitutional validity of state statutes limiting those rights. For example, in Prince v. Commonwealth of Massachusetts, 321 U.S. 158 (1944), this Court was faced with the contention that a state statute precluding labor by a child of tender years in distributing religious tracts was a violation of its parent's constitutional rights to freedom of conscience and religious practice and to freedom to bring up its child in a religion. Recognizing that the rights asserted by the parent have a "preferred position in our basic scheme," Mr. Justice Rutledge in the opinion for the Court, spoke of the appropriate approach to be used in evaluating the constitutional validity of the state statute in question:

> "To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the

welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent, well-developed men and citizens. Between contrary pulls of such weight the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on."

Rejecting the position of Justice Murphy that any restriction of First Amendment freedoms must be treated by the Cout as "prima facie invalid" and as placing the burden on the state "to prove the reasonableness and necessity" of its regulation, 321 U.S. at 166, Mr. Justice Rutledge stated for the Court:

"It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra (268 U.S. 510). And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

"But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145; Davis v. Beason, 133 U.S. 333. And Neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's

course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

"A democratic society rests, for its continuance, upon the health, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. ...

"The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at time does create situations difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental

uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. 321 U.S. at 166-170.

The decision in Prince should be viewed as concluding the appellants in this case, which from every standpoint is an a fortiori case relative to Prince. This Court there assumed that the child had a right to life that the state had a right to protect by legislation. Once it is decided that the unborn child is a person within the meaning of the constitutional safeguards of the person, the Prince decision means that it also has a right to life that the state has a right to protect by legislation. Moreover, appellants cannot rely upon First Amendment freedoms as did the appellant in Prince. Appellants do not present a case in which they are in good faith seeking to implement their own notions of what is for the welfare of their actual or future child. Instead, they seek to destroy or to obtain the right to destroy their present or future unborn child. The State of Texas has acted, as had Massachusetts, in "the interest of youth itself, and of the whole community, that children be safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens." Indeed, the state has acted to prevent the parent from acting "to expose...the child...to...death," something this Court stated a parent has no right to do. 321 U.S. at 166-167. If this Court was willing to affirm a state's power, as in Prince, to preclude by statute a parent from exposing its child to "the crippling effects of child employment" including the harmful possibilities...of emotional excitement and psychological or physical injury" involved in soliciting funds for religious tracts being distributed, 321 U.S. at 169-170, it should be moved even more strongly to affirm a state's power to preclude a parent or another at its direction from destroying the life of the former's child. Certainly, under the Prince decision, the state in enacting and retaining the traditional form of abortion statute is entitled to the presumption in enacting and maintaining it. Indeed, in view of the diffi-

cult decision problem the state faces in balancing the competitive or correlative interests of the unborn child and of its single mother or married parents, this Court should be relatively reluctant to disturb the state's choice of what seems to it to be the appropriate solution, particularly when it can be so strongly supported as to its reasonableness as will be demonstrated below.

Federal District Courts in Louisiana and Ohio have sustained the right of the state under abortion statutes substantially identical to that of Texas to protect the constitutional right of the unborn child as a person to its life. Rosen v. Louisiana State Board of Medical Examiners, 318 F. Supp. 1217 (E.D. La. 1970) and Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

Judge Young in the Steinberg case stated:

"Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it.

"There is authority for the proposition that human life commences at the moment of conception.

> "Biologically speaking, the life of a human being begins at the moment of conception in the mother's womb. ...
>
> "From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as human being, but as such from the moment of conception...which it is in fact.

"If the law is in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose of protecting property rights, how can it possibly not be in accord with science for the purpose

of protecting life itself, without which no property right has any worth or value whatsoever." Id. at 746-747.

Judge Ainsworth of the Rosen case, supra, relied primarily in his opinion upon a proposition stated by Mr. Justice Holmes in Lochner v. New York, 198 U.S. 45, 76 (1905) (dissenting opinion):

> "The word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. ...We are not persuaded that the Louisiana abortion laws infringe any fundamental principle as understood by the traditions of our people. As an ethical, moral, or religious matter a woman's refusal to carry an embryo or fetus to term, both historically and today, has been condemned as wrong by a substantial, if not a dominant, body of opinion, except in very limited circumstances." Id. 318 F. Supp. at 1231.

Neither of the theories of decision employed in the Steinberg and Rosen cases is precisely the theory of decision urged by amicus upon this Court which is primarily based upon principles of constitutional interpretation and upon a judicial gloss upon the Constitution that indicate that the unborn child is a person and has a right to life protected by the Constitution. Nevertheless, amicus considers the theories of decision employed in the Steinberg and Rosen cases to be appropriate supportive theories for adoption by this Court in disposing of this case.

The courts in the Steinberg and Rosen cases also correctly anticipated the decision by this Court in United States v. Vuitch, 402 U.S. 62 (1971),

holding the traditional type of state abortion statute t to be unconstitutionally vague. They also correctly plied this Court's decision in Griswold v. Connecticut, 1 U.S. 479 (1965) as the other federal district courts, cluding the lower courts, that have struck down the tra- tional type of state abortion statute, have not. Without y consideration of the issue of whether the unborn child s a person and without the constitutional safeguards of e person, including the Ninth Amendment, the lower court mply looked to the rights of single women and married uples and stated:

> "Plaintiffs argue as their principal contention that the Texas abortion Laws must be declared unconsitutional because they deprive single women and married couples of their right, secured by the Ninth Amendment, to choose whether to have children. We agree."
>
> "Since the Texas Abortion Laws infringe upon plaintiffs' fundamental right to choose whether to have children, the burden is on the defendant to demonstrate to the satisfaction of the Court that such an infringement is necessary to support a compelling state interest. The defendant has failed to meet this burden." Roe v. Wade, 314 F. Supp. 1217, 1221-1222 (N.D. Tex. 1970).

milarly, the lower court in Doe v. Bolton, 319 F. Supp. 48 (N.D. Ga. 1970) stated after referring to the Gris- ld case, supra:

> "For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy." Id. at 1055

ile the court in the Bolton case, supra, recognized at the parent's decision to abort affects others, it s unwilling to

"posit( ) the existence of a new being with its own identity and federal constitutional rights,.. 319 F. Supp. 1955

Taking a somewhat more cautious position than the lower court in this case, that court held that the state had a right to participate in the decision to abort and to treat the problem wholly "as a medical one," Ibid., but that the state had no right to "limit() the number of reasons for which an abortion may be sought." Id. at 1056. So far as the unborn child is concerned, the decision by the court in the Bolton case does not differ from the decision by the lower court in this case.

The position taken by the lower court below in the Bolton case has also been taken by several other courts. People v. Belous, 80 Cal. Rptr. 354,359 (S. Ct. Cal. 1969) cert. denied, 397 U.S. 915 (1970); Doe v. Scott, 321 F. Supp. 1385, 1389 (N.D. Ill. 1971) (appeal docketed sub nom. Hanrahan v. Doe, 39 U.S. L.W. 3438 (U.S. Mar. 29, 1971) (No. 1522, 1970 Term; renumbered No. 70-105, 1971 Term), stay issued (Marshall, J. Sup. Ct. Feb. 10, 1971) Doe v. Rampton, No. C-234-70 (D. Utah. 1970); and Babbitz v. McCann, 310 F. Supp 293, 301 (E.D. Wis. 1970) appeal dismissed for want of jurisd. 400 U.S. 1 (1970) (per curiam);

All of these cases, other than the Steinberg and Rosen cases, commit a fundamental error in constitutional law adjudication. They fail to confront and to decide whether the unborn child is a person within the meaning of the constitutional safeguards of the person, including the Ninth Amendment. For this reason, they also fail to confront and to decide whether the unborn child as a person protected by the Constitution has a constitutional right to life that the state may or must protect. Once these issues are confronted and resolved, as demonstrated above they must be in favor of the unborn child, then the whole framework of constitutional argumentation and decision changes. The Griswold case, supra, instead of being authority for these decisions is rather authority for their complete rejection.

The Griswold case concerned the validity of a state law that operated "directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. at 482. That law proscribed use of a drug or instrument for preventing conception as well as any action assisting or counseling this use. The defendants, an officer and a medical director of a Planned Parenthood League, had been fined for instructing and advising a married couple as to means of preventing conception. The Court held the statute invalid under the Fourteenth Amendment because it was designed "to achieve its goals by means having a maximum destructive impact" upon the above human relationship and thereby "sweeping unnecessarily broadly and thereby invading the area of protected freedoms." 381 U.S. at 485. The particular sector of the area of protected freedoms involved in this case was the right to privacy of the husband and wife in an intimate relationship--described by the Court as a "zone of privacy" created by several fundamental constitutional guarantees, including the First, Third, Fourth, Fifth, and Ninth Amendments. Id. at 484-485. The Court emphasized that each of the specific guarantees in the Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 484. It was in this respect that the Court's reliance upon the general protective language of the Ninth Amendment took on special significance, suggesting that it might serve as the vehicle for these emanations. Its very content emphasizes that rights other than those specifically guaranteed exist and that there may be other important zones of privacy involving human relationships besides that existing between husband and wife.

The Appellants' heavy reliance upon the Griswold case, supra, could not have been a more misplaced one. Griswold is one of the principal cases supporting the position of the Appellee. It is a case which elaborates the theory of constitutional protection of privacy in human relationships. A human relationship involves human persons. One of the most vital of human relationships

is that between the parent and the child, including the unborn child, and especially the relationship between mother and child. Nature has given the father an important initiative and supportive role in the relationship between parent and child. It has given the mother, however, the role of providing the temple in which the human life process starts upon conception with the embryo and unborn child rapidly developing thereafter and then growing in an orderly and wonderful fashion to the point when it is ready for birth. The unborn child is very much a human person, as previously demonstrated, and is a very important part of the relationship between parent and child. If there ever was a "zone of privacy" in human relationships that should generate and receive respect, it is that involved in the relation between mother and unborn child. The unborn child is by nature closed off in its mother's womb from the world and provided with the protection and assistance of the mother as it grows and as its bones, nervous system, brain, and organs, which develop at a very early date in the pregnancy, continue to develop. This privacy is essential to the maturing of the child and there is still no substitute for it throughout most of its period of development in the womb. Nature "intended" this privacy.

Surely, also, this is one of the most important "zones of privacy" to political society and required to be protected by it. It involves one of the most primordial and basic of the "privacies of life". The Supreme Court recalled in Griswold that "the Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630 as protection against all governmental invasions of...the privacies of life." Id. at 484. It is the privacy of life that belongs to the unborn child, a human person before the law. Unless this zone of privacy--"the privacy of life" of an unborn child--is protected by either the terms of the Due Process Clauses of the Constitution which after all, directed toward protection of "life", or by its "penumbras" or those of other specific guarantees, or by the Ninth Amendment,

nat child, the institution of the family, and political ociety itself are gravely threatened. The unborn child, n this event, cannot be born, become a citizen, enjoy he fellowship and love of the family, participate in olitical society by enjoying its benefits and bearing ts burdens, or realize upon its potential for self- ealization and contribution to others. The family in- titution becomes degraded through the insertion and ractice of violence against itself and one of its mem- ers although this violence and destruction is wholly nnecessary. Political society becomes endangered and the ommon good is sacrificed to the whim and caprice of usband and wife who seek, in the name of their own pri- acy and convenience, another's privacy of life who can- ot defend itself and who has done nothing to threaten hose who destroy it. It is this kind of result--the nvasion of privacy of the human person--about which riswold was very much concerned. That case necessarily emands, if the relationship between husband and wife s protected against invasion in its intimate aspects by the state, that the relationship between parent and child--and especially between mother and child--be pro- tected against invasion by its parent or parents or even by the state itself through an abortion.

What the lower courts failed to recognize in this and the Bolton case, supra, is the simple fact em- phasized by the courts in Steinberg and Rosen, supra:

> "Contraception, which is dealt with in Griswold, is concerned with preventing the creation of a new and independent life. The right and power of a man or a woman to determine whether or not to participate in this process of creation is clearly a private and personal one with which the law cannot and should not interfere.
>
> It seems clear, however, that the legal con- clusions in Griswold as to the rights of in- dividuals to determine without governmental

interference whether or not to enter into the processes of procreation cannot be extended to cover those situations wherein, voluntarily or involuntarily, the preliminaries have ended, and a new life has begun. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the duty of safeguarding it. 321 F. Supp. at 746.

"For the purposes of this case we assume, if we are not required to recognize, e.g.., Griswold v. Connecticut, 318 U.S. 479 (1965);.. that as a general matter women possess under our constitution a 'fundamental right' to determine whether they shall bear children before they have become pregnant. A state may interfere with this right of choice only in special circumstances. We deal in this case, however, not merely with whether a woman has a generalized right to choose whether to bear children, but instead with the more complicated question of whether a pregnant woman has the right to cause the abortion of the embryo or fetus she carries in her womb. We do not find that an equation of the generalized right of the woman to determine whether she shall bear children with the asserted right to abort an embryo or fetus is compelled by fact or logic... The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplated the creation of a new human organism, but the latter contemplates the destruction of such an organism already created. To some engaged in the controversy over abortion, this distinction is one without a difference....To others, however,... the difference between the decision not to conceive and the decision to abort is of fundamental, determinative

importance. Thus the root problem in the controversy over abortion is the one of assigning value to embryonic and fetal life. 318 F. Supp. at 1222-1224.

Thus, once it is determined, as it must be that the unborn child is a person within the meaning of the constitutional safeguards of the person, the Prince and Griswold cases require this Court to sustain the good faith effort of the State of Texas to protect the life and other interest of that child by an abortion law, if that law is a reasonable one in its assessment of the competing interests of that child, its parents, and of the State itself.

B. The State cannot reasonably leave the fate of the unborn child to be decided by private persons such as the appellants in this case either with respect to whether an abortion is to be performed or with respect to the appropriate reason for an abortion. To do so would be an unconstitutional delegation of authority and a denial of equal protection of the laws guaranteed to the unborn child as a person protected by the Fourteenth Amendment.

If the state provided no statute for regulating the performance of abortions, it would be delegating unconstitutionally its authority to regulate the subject of abortions over to private persons. If this would be the case, this fact constitutes one of the major reasons for the reasonableness of state action in seeking to protect the constitutional right to life of the unborn child by some form of regulation of the subject matter of abortion. It is particularly fitting that when a state has been held to have violated the Fourteenth Amendment and the Ninth Amendment by the enactment of an abortion statute, that that state be judged in terms of federal standards as to the reasonableness of its actions in attempting to avoid an unconstitutional delegation of power to private

persons who have challenged that statute and seek to assume the exercise of that power.

Justice Black in his dissent in Zemel v. Rusk, 381 U.S. 1 (1965) has articulated the kind of argument that is relevant to the point now being made with respect to an unconstitutional delegation of power. In that case, the question presented was whether, if the Secretary of State was statutorily authorized to refuse to validate passports of United States citizens for travel to Cuba, his authority was constitutionally permissible. Justice Black took the position that that authority was not constitutionally permissible since the subject matter was a law "restricting the liberty of our people." He stated:

> "Nor can I accept the Government's contention that the passport regulations here involved are valid 'because the Passport Act of 1926 in unequivocal words delegates to the President and Secretary a general discretionary power over passports....' That Act does provide that ' the Secretary may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries...under such rules as the President shall designate and prescribe.." Quite obviously, the Government does not exaggerate in saying that this Act 'does not provide any specific standards for the Secretary' and 'delegates to the President and Secretary a general discretionary power over passports'--a power so broad, in fact, as to be marked by no bounds except an unlimited discretion. It is plain therefore that Congress has not inself passed a law regulating passports; it has merely referred the matter to the Secretary of State and the President in words that say in effect, 'We delegate to you our constitutional power to make such laws regulating passports as you see fit.' The Secretary of State has proceeded to exercise the power to make laws regulating the

issuance of passports by declaring that he will issue them for Cuba only to 'persons whose travel may be regarded as being in the best interest of the United States,' as he views that interest. For Congress to attempt to delegate such an undefined law-making power to the Secretary, the President, or both, makes applicable to this 1926 Act what Mr. Justice Cardoza said about the National Industrial Recovery Act: 'This is delegation running riot. No such plentitude of power is susceptible of transfer.' A.L.A. Schecter Poultry Corp. v United States, 295 U.S. 495, 553 (concurring opinion)....

"Our Constitution has ordained that laws restricting the liberty of our people can be enacted by the Congress and by the Congress only. I do not think our Constitution intended that this vital legislative function could be farmed out in large blocks to any governmental official, whoever he might be, or to any governmental department or bureau. Whatever administrative expertise it might be thought to have. The Congress was created on the assumption that enactment of this free country's laws could be safely entrusted to the representatives of the people in Congress, and to no other official or government agency. The people who are called on to obey laws have a constitutional right to have them passed only in this constitutional way." Id. at 21-22. (dissenting opinion)

Mr. Justice Douglas and Mr. Justice Goldberg concurred in the dissent of Justice Black. Id. at 23, 27. The Court in an opinion by Mr. Chief Justice Warren sustained the challenged statute on the ground that regard for the recent historical context in which it had been administered before its enactment indicated that area restrictions had been utilized by the Secretary of State. It is to be noted that in the Zemel case at least the

basic statute drawn in question delegated to the Secretary of State the specific authority "to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries..." rather than only a more general authority such as "to provide for the interests of American Citizens relative to foreign travel." Moreover, as pointed out by the majority, there had been the administrative practice of utilizing area restrictions prior to the most recent reenactment of the statute.

The situation in which the state would be clearly placed if it repealed its abortion statute, however, would be quite similar to the situation which Justices Black, Douglas, and Goldberg believed the Congress to have been in after enactment of the statute challenged in the Zemel case. It would be in the situation of simply having turned over the protection of the right of unborn children relative to their lives to the uncontrolled discretion of their parents and the physicians they employed. It would simply be the situation referred to by both Justice Black in his Zemel dissent and earlier by Justice Cardoza in the Schecter case, supra:"

> "This is delegation running riot. No such plenitude of power is susceptible of transfer." 295 U.S. 495, 553 (concurring opinion).

Moreover, the "delegation running riot" would be operating in the context not of economic regulations of prices and wages by private groups but in the context of control of the constitutional right to life of unborn children by private persons. It seems clear that Justice Black would have been moved to say in the instant case that the State of Texas acts reasonably when it refuses to turn over such control to private persons over the most important right a person possesses, his right to life.

The situation in which the State of Texas would find itself should it not have some regulation of abortion on its statute books would be much more like the situation

presented in the case of Kent v. Dulles, 357 U.S. 116 (1958). In that case it was contended that the statute authorized the Secretary of State to withhold passports to citizens because of their beliefs or associations. The same statute involved in the later Zemel case, supra, was the basis of this asserted authority. The claim of authority was challenged as an unconstitutional delegation of legislative power. Instead of reaching this constitutional issue, the Court wisely concluded that the statute did not delegate to the Secretary the kind of authority he had claimed. As in Green v. McElroy, 360 U.S. 474 (1959), this Court was at pains to point out that it was the constitutional right to travel and to freedom of speech that was affected by the action of the Secretary for which he claimed statutory authority. In the opinion for this Court, Mr. Justice Douglas stated:

> "Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it....
>
> "And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them...Id. at 129.

In the situation we are now assuming the State of Texas to be as a result of acting to repeal its statute of abortion and replacing it with no statute, we are confronted with the right of a human person, the unborn

child, to live, the right prior to, and the necessary foundation of, all other rights he may possess, including the right to travel. It is "life" rather than "liberty" or "property" that is at stake and this makes all the difference. If that "life" is to be regulated, indeed taken (assuming that it is constitutionally possible under some limited circumstances, "it must be pursuant to the law-making functions..." of the Texas Legislature. But, by hypothesis, the Legislature has turned over the power to control the life of the unborn child to private persons. Amicus suggests that the federal doctrine concerning unconstitutional delegations of legislative power demonstrate how reasonable the State of Texas has been in refusing to turn over the matter of whether to preserve the life of unborn children to private persons.

But the hypothetical situation we have been discussing is the situation that appellants want and that others like them have been able to persuade some federal district courts to provide them. The decision of the courts that have invalidated state laws of abortion and especially those that have denied the state any right to control the reasons for which an abortion may be performed, as in the Bolton case, supra, in effect are compelling the delegation of state authority to regulate the subject matter of abortions over to private persons without any standards whatsoever.

The State of Texas is acting reasonably in refraining from turning over power to regulate the subject matter of abortions to private persons for another reason, the prevention of a denial of equal protection of the laws to unborn children. If the state turned over control of the lives to unborn children to private persons in the form appellants seek and that others have obtained by the decisions such as that in the Bolton case, supra, this would permit the drawing of irrational and invidious distinctions between unborn children whose lives it permits to be destroyed by abortions with the mere consent of their parents, on the one hand, and the unborn children whose lives it protects so long as their parents have not

consented to an abortion. This irrational and invidious distinction, based upon the bare consent of the parents of these unborn children, clearly is a denial of equal protection of laws to these citizens.

This Court in Levy v. Louisiana, 391 U.S. 68 (1968) established the definitive approach to the problem of equal protection which the State of Texas has properly solved by its abortion statute. In that case a Louisiana statute was challenged as a denial of due process and equal protection of the law under the Fourteenth Amendment. That statute, which provided for a right to recover damages for injuries inflicted by another, was construed by the Louisiana courts as permitting the survival of the right to recover in favor of a child only if that child was a legitimate child. In holding this statute to be a denial of equal protection of the law, Mr. Justice Douglas in the opinion for the Court stated:

> "We start from the premise that illegitimate children are not 'nonpersons'. They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."
>
> "While a State has broad power when it comes to making classifications, it may not draw a line which constitutes an invidious discrimination against a particular class. See Skinner v. State of Oklahoma, 316 U.S. 535, 541-542. Though the test has been variously stated, the end result is whether the line drawn is a rational one.
>
> "We have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage

for loss of his mother is in issue, why, in terms of 'equal protection,' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock. He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?

"Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent upon her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.

"We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother." Id. at 70-72

In the Levy case, the statutory right of illegitimate children to recover damages for an injury resulting in the death of their mother was at stake. In this case the even more important constitutional right to life of unborn children is at stake. These rights of the unborn children protected by the Texas statute also "involve the intimate, familial relationship between a child and his (or her) own mother." The rights protected by this statute also involve their relationship to the father, to other children of their parents, to the American political society, and to the whole human race. These rights also involve the relationship between the unborn child and the vast spectrum of common law, statutory, and constitutional rights that they have long since been recognized to possess and for which they are entitled to secure protection.

Most children are legitimate and their conception simply the most normal outcome of married life of their parents who now have had a change of mind about rearing children. Why should the unborn child be denied the right to life merely because his parents do not want the child? Why should this unborn child, a perfectly healthy human being waiting to be born, be subjected to the destruction of its life while another unborn child is not so subjected, the only basis for the vast difference in treatment of the two being the consent of one set of parents to the abortion and the non-consent of the other set of parents. The consent or non-consent of the two sets of parents has no relation to the alledged wrong inflicted on the mother or the two parents of the child; indeed, there is no possibility of alledging any wrong on the part of the unborn child. The consent or non-consent of the two sets of parents does not intrinsically relate to the chils or any problem it might be creating for its parent or parents. It is wholly connected with an evaluation of the right of the unborn child to its life and objective factors that might, under narrow circumstances, warrant the destruction of the child's life.

The recent case of Shapiro v. Thompson, 394 U.S. 618 (1969) provides additional guidance for the response to this question. In that case, the Court considered appeals from decisions of three-judge District Courts relative to a state or District of Columbia statutory provision denying welfare assistance to residents of a state or district who have not resided within their jurisdictions for at least one year immediately preceding their applications for such assistance. The assistance that had been applied for included assistance for dependent children (AFDC) and several of the applicants were pregnant at the time they filed their applications for assistance. The Court held these statutory provisions to be a denial of equal protection of the laws. Mr. Justice Brennan in the opinion for the Court, stated:

> "There is no dispute that the effect of the waiting-period requirement in each case is to create

> two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more , and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist--food, shelter, and other necessities of life. .. appellees' central contention is that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. We agree. The interests which appellants assert are promoted by the classification either may not constitutionally be promoted by government or are not compelling governmental interests." Id. at 627.

Mr. Justice Brennan also observed that the traditional criteria for determining whether equal protection of the laws had been denied were not applicable:

> "Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause." Id. 638

Thus, the opinion of the Court pointed out that while a certain legitimate interest of the state or of the District of Columbia might be promoted by the legislation and thus "a rational relationship between the waiting period and these four admittedly state objectives" established, this was not sufficient to justify the classification. Instead, it must be shown that the classification

s necessary to promote a compelling governmental interest. Pointing to one of the state or district interests, r. Justice Brennan observed:

> "Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year." Id. at 637.

Applying the rationale of the Levy and Shapiro ases to the instant case, it is necessary in order to justify the State of Texas turning over the control of bortions to private persons like the appellants, rather han retaining that control as it has in its present abor- ion law, to show that it is necessary to take the lives f unborn children in order to promote a compelling gov- rnmental interest. Otherwise, the state in turning over his control to private persons would be acting unconsti- utionally by denying to unborn children equal protection f the laws. Far from the burden being on the state to emonstrate it has a compelling state interest for limiting he right of single women and married couples to determine hether to abort their unborn children, the burden under he Levy and Shapiro cases would be on the state to demon- trate the compelling interest it has should it take legis- lative action that would submit the lives of unborn child- ren to the uncontrolled discretion of their parents and hysicians they employ. And amicus suggests that the bur- den that would have been on the state in such a situation s the burden that appellants properly face in the in- tant case. This Court cannot deny the right of the State f Texas to comply with its standards for determining what s necessary in order to respect the right to equal pro- tection of the laws of persons, including unborn children.

Thus, the action of the state of Texas in en- cting an abortion statute is eminently reasonable because t is designed not only to avoid an unconstitutional de- legation of power over one of the most fundamental of

human rights to private persons, the right of life, but also to avoid invidious and irrational distinctions being drawn between unborn children and between those children and their parents, each considered in their status as human persons with respect to this right to life. Moreover, the appellants have not discharged their burden of demonstrating a compelling interest of the state that would justify the state giving permission to appellant single mother and appellant married couple to destroy or to direct the destruction of the lives of their children. Unless that can be done, this Court is not justified in holding the state has acted unreasonably in protecting these children under its abortion statute.

C. The affirmative, particular reasons that can be adduced in behalf of the Texas law of abortion demonstrate the reasonableness of the state legislative judgment to enact and maintain that law and they counsel extreme caution on the part of federal courts in declaring that state legislative judgment to be unconstitutional.

There are eight principal, affirmative reasons for the State of Texas to adopt and to maintain its law of abortion. Most of these have already been developed and are as follows: (1) the unborn child is a person within the meaning of the constitutional safeguards of the person; (2) the unborn child, as such a person, has the constitutional right to life; (3) the state has the right, if not the duty, to protect the constitutional right to life of the unborn child; (4) for the state to turn the control over the protection of the constitutional right to life of unborn children to private persons, such as appellants, would result in an unconstitutional delegation of legislative power and in the drawing of invidious and irrational distinctions by these private persons between unborn children and between unborn children and other persons, such as the appellants; (5) the state has an interest in protecting the continuation of the body of persons and citizens forming the human element of families and of political society itself; (6) the state has an

interest in preventing destruction of innocent human life where no adequate reason exists for that destruction in order to prevent the citizenry from becoming habituated to violence as a mode of social control and insensitivity to the value and the dignity of the human person; (7) in light of all the above reasons, the state has a compelling governmental interest in protecting the constitutional right to life of the unborn child absent a showing, in individual cases upon the basis of individual data, that there is a compelling governmental interest that overrides the former compelling governmental interest; and (8) there has been no persuasive demonstration of any compelling governmental interest by persons in the position of appellants that would warrant the state turning over to private persons the power to make decisions as to whether or not, and for what reasons, unborn children should continue to enjoy their constitutional right to life or that would warrant the state in extending the grounds upon which abortions could be secured by persons such as appellants.

Only the sixth and eighth reasons set out above for adoption and maintenance of the Texas law of abortion will be discussed here since the others have already been sufficiently developed.

The twentieth century has more and more frequently been described as a century in which violence and brutality have been promoted psychologically and as a technique for achieving social goals. For the National Socialists war became a way of life for the German government, a way of achieving national goals irrespective of the lack of justice in those goals or the methods used. Within Germany itself and in countries it occupied it addressed itself to the sordid task of destroying in gas ovens and by other means some 6,000,000 innocent men, women and children, including the unborn, of the Jewish faith on the view expressed by Hitler that the Jew deserved extermination as an "anti-man" or "unperson". Many additional millions of jews and eastern European peoples were seized in their homelands, without respect for family

units, and committed to slave labor in Germany. Even the judicial system itself was converted into a technique of violence by German judges against German citizens in which the hard-won procedural guarantees respected elsewhere throughout Western Society were cast aside and adjudication was converted into a technique of murder, false imprisonment, and extortion. This story has been thoroughly elaborated in such trials as the Nuremburg Justice Trial, United States v. Josef Alstoetter, et al., (United States Military Tribunal No. III, 1947). and in books such as that of William L. Shirer.[1] In the Soviet Union the Communist regime utilized methods of collectivization of farms and industrialization in its autonomous republics that equally thorough and ruthless. Genocide was practiced against whole peoples. National cultures were destroyed. Groups of people were forced to migrate from their home areas to other republics. Millions of persons died in the process of enforcement of a policy of starvation in farm areas while the survivors were taken from their lands and placed in slave labor camps. All who opposed the program of the Communists in the Soviet Union were destroyed or effectively disabled by arbitrary means from causing trouble.[2] In our own country, we have seen an extraordinary increase in the pervasiveness of organized crime, whose leaders have undertaken new forms of violence for the achievement of their unjust ends since World War II. Careful students of our culture, such as Max Lerner, state that "America today, as in the past, presents the picture both of a lawless society and an overlegislated one." [3] Organized crime represents a

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[1] William L. Shirer, The Rise and Fall of the Third Reich, N.Y.: Simon & Schuster, 1960.

[2] Institut zur Erforschung der USSR, Forty Years of the Soviet Regime, Munich, 1957.

[3] Max Lerner, America as a Civilization. New York: Simon & Schuster, 1957.

idespread phase of what Lerner terms the ruthlessness of ur society. More recently, as a kind of disillusionment as set in among minority groups and the young following he hopes entertained in the early 1960's for solving ome of our country's persistent problems, there has ccurred an elaboration and action upon philosophies of iolence that in their extreme forms have included kid- apping, killing, and maiming of the innocent; the des- truction of property; the effort to disparage and disrupt he orderly administration of justice in our courts; and pposition to the entire system of what we have deemed to e the "free and democratic society." [1] What has been so triking about the philosophers of violence, as one able bserver has stated,

> "is the extraordinary degree of certainty by which it is inspired: certainty of one's own rectitude, certainty of the correctness of one's own answers, certainty of the accuracy and profundity of one's own analysis of the problems of contemporary society, certainty as to the iniquity of those who disagree. [2]

A member of this Court was moved to observe with respect to this emerging philosophy:

> "Violence is never defensible-and it has never succeeded in securing massive reform in an open society where there were alternative methods of winning the minds of others to one's cause and securing changes in the government or its policies." [3]

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[1] See, e.g., Midge Decter, "Anti-Americanism in America," Harper's Magazine (April, 1968) 39; Lewis S. Feuer, "On Civil Disobedience", The N.Y. Times Magazine (Sept. 26, 1967) 29, 122.

[2] George F. Kennan, "Rebels Without a Program," The N.Y. Times Magazine (Jan. 21, 1968) 60.

[3] Associate Justice Abe Fortas, Concerning Dissent and Civil Disobedience: We have an Alternative to Violence. New York: Signet Books, 1938. 80.

Many have felt that the American involvement in a series of wars throughout the twentieth century, and especially in the Viet Nam war, have been contributing to a breakdown in the high regard for the value of human life among Americans.

It would seem most evident, in the context of this violent generation, one which lives with the daily possibility of all-out nuclear warfare capable of wiping out most of mankind in a thirty minute period as we are told, the State of Texas cannot be charged with acting unreasonably when it has continued to maintain its law of abortion on its statute books for the same purposes for which it was enacted: the protection of the constitutional right to life of innocent unborn children who are unable to defend themselves against parents who would destroy them although the life of the mother is not in danger and there are reasonable alternatives both before the conception of that child or after its birth for avoiding the burden of rearing children. The State of Texas can reasonably say of those who seek the power to control the matter of abortion, as part of their constitutional right of privacy, what Michael Novak has said of certain other groups:

> "Prophetic minorities in history commonly rectify a balance by holding to one clean line; and in doing so they cast a lovely light. But they are inclined to be inhuman, to move upon too narrow a base, and to falsify human possibilities by prematurely foreclosing them." [1]

Several typical arguments have been made in support of invalidating state statutes on abortion like that of Texas. They have been in legislative halls across the country, including those of the Texas Legislature during

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[1]Michael Novak, "The Secular Saint," The Center Magazine (May, 1968) 55-56.

its 1971 session in conjunction with the proposal of one of the most unlimited forms of liberalized abortion statutes.[1] They are far from persuasive and demonstrate the reasonableness of the Texas Legislature in adopting and continuing to maintain its present law on abortion.

The typical arguments are listed below and a sufficient comment upon them given to support the reasonableness of the Texas Legislative judgment in adopting and maintaining its present law on abortion. Amicus has relied principally upon the discussion of these arguments contained in the works of two distinguished authors, Daniel Callahan of the Institute of Society, Ethics and the Life Sciences and David Granfield, Professor of Law, Catholic University School of Law.[2]

> Argument One: The grounds for abortion should be extended to include psychiatric reasons in order to prevent the mother from carrying out a valid suicide threat which endangers her life.

Callahan reports upon numerous careful studies that indicate a consensus upon the following proposition: that suicide following rejection of an application for abortion is "very rare", "often used to blackmail psychiatrists," and "the pregnancy is not the most important cause of her emotional distress."[3] He further points out where there is

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1 Texas Legislature, H.B. No. 1092.

2 David Granfield, The Abortion Decision, New York: Doubleday & Co. 1969

3 Daniel Callaghan, Abortion: Law, Choice and Morality. London: Macmillan Company, 1970. 62

a "liklihood of a severe neurosis or psychosis as a result of a pregnancy carried to term, the general opinion seems to be that only in the rarest cases would supportive therapy be totally useless."[1] He also reports that psychiatrists and many authorities feel that "there exist alternative ways of handling these difficulties other than by abortion."[2] Callaghan also records the lack of any sort of a consensus among psychiatrists "on fixed and clear norms for psychiatric indications for abortion."[3]

Dr. Theodore Lidz, Yale Professor of Psychiatry, has observed:

> "If we wish to have the laws concerning abortion changed, wishing to do away with that which seems hypocritical at present, let us be honest and seek to have the burden of such decisions left with the parents and not make judges out of doctors. The doctor is burdened enough trying to preserve life without getting involved in questions of when to terminate it. Indeed, it is a burden of modern man that so much is to be resolved by conscious choice unguided by ethical code. One may feel at times that whatever gods may be laughing in their far-off heavens at the dilemma of man who, through seeking to control nature and bring more and more out of the realm of contingency and under human control, has managed to become increasingly perplexed, confused, and self-destructive. There is a law concerning therapeutic abortion and it seems to me that, although such rigid limitation provokes us at times,

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[1] Id. at 63

[2] Id.

[3] Id. at 82

such laws are a benefit to physicians, protecting them from the need to make impossible decisions--decisions that often go beyond their knowledge."[1]

Clearly, in this state of knowledge about "psychiatric reasons", the Texas legislative judgment in refusing to extend the grounds for legal abortion to include "psychiatric reasons" is most reasonable. There is little evidence to show that the neuroses or psychoses of pregnant women represent a significant danger to their lives comparable to the certainty of death for unborn children in abortion. Moreover, there are modes of treatment and confinement to protect pregnant women from their own defect or illness that might lead to suicide.

Argument Two: The grounds for abortion should be extended to include fetal indications for abortion such as "where there is a sensitization to the Rh factor, where the fetus has been exposed to a dangerous amount of radiation, where serious hereditary defects are likely to be present and cause genetic abnormalities; where harmful drugs (such as thalidomide) which have a high liklihood of producing fetal defects have been taken during pregnancy; and, finally, where the mother has contracted viral infections, particularly rubella."

Amicus has earlier pointed out the development of the new science of Fetiologyand the present ability of the science to employ exchange transfusion techniques. In addition, Callaghan indicates that there is now a gamma-globulin injection which forestalls Rh complications from the outset. With respect to radiation,Callaghan reports that data on the dangers involved from radiation are incomplete and there is no establishment of the certainty that each child born will be defective.

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[1]Theodore Lidz, as cited in Harold Rosen, Therapeutic Abortions, Medical, Psychiatric, Legal, Anthropological, and Religious Considerations. N.Y.: Julian Press, 1954. 278

Granfield states that "the current prediction rate in the area of genetic fetal abnormalities is very limited."[1] There are a number of constructive steps that can be taken rather than legislating these children out of existence: support for the family in need of it to care for the defective child; support for medical and scientific research that has proved in this century its ability to deal very effectively with both childhood defects and diseases; and provision of facilities and facilities for the rehabilitation and education of defective children.

Where the child defect is feared because of the taking of a harmful drug, such as thalidomide, the obvious first answer is that government must take care through tests and experiments to assure that harmful drugs likely to cause child defects do not come on the market. Beyond this is the fact that the particular child defect resulting from a drug, such as thalidomide, does not justify destroying the life of the child. The main defect resulting from the taking of thalidomide by expectant mothers was the absence of various limbs. The defect can be dealt with through rehabilitative techniques. The child is otherwise a perfectly normal human being. Moreover, the danger of having a defective child was only considerable as result of the mother having taken thalidomide. To authorize the destruction of all children where the mother has taken such a drug is to authorize the destruction of not only an innocent life but in many cases also a perfectly sound one. Again, the same measures that were recommended with respect to genetic fetal abnormalities are good alternatives here. It is entirely defensible also that government which has failed to conduct adequate testing so as to result in harm doing drugs should be held responsible in damages to affected parents and children. Callaghan states that the most frequent child defect most frequently urged as a basis for extension of the grounds for abortion is the situation where the mother has contracted rubella.[2]

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[1]Granfield, supra at 116.

[2]Callaghan, supra at 93.

Here, again, science has provided an adequate answer. There is now an effective vaccine against the disease and its incidence will likely drop greatly in the future.[1] Moreover, there is a strong liklihood that the mother who has contracted rubella will have a normal child or that the child will have only minor defects that can be corrected.[2] Beyond all this, no more than 15 percent of women capable of bearing children are subject to contracting rubella at all. [3] This seems scant justification, if there ever was any, for urging that grounds for abortion be extended to cover child defects in the situation where the mother has contracted rubella. Finally, the same efforts should be taken by the community to provide support for the family with defective children, and to provide facilities for the rehabilitation and education of these children.

One thing neglected in the above analysis is the viewpoint of the child with a defect at birth resulting from any of the above listed causes. That child is the person who has the constitutionally protected right to life. Its view and that of the community should be considered with respect to the worth of its life rather than the parents view as to the financial and other difficulty placed upon them of raising such a child. The burden of proof should be and is on the latter to prove that there is a compelling governmental necessity for authorizing the destruction of the child, who is after all a human person. As the Court observed in Goldberg v. Kelly, 397 U.S. 254, 264-265 (1970), where it was contended that countervailing governmental interests in conserving fiscal and administrative resources warranted terminating welfare assistance payments without a hearing:

> "The interest of the eligible recipient in uninterrupted receipt of public assistance, coupled

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[1] Callaghan, supra at 93

[2] Id. at 104

[3] Id.

with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

"The crucial factor in this context...is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits."

Similarly, if the principal argument that appellants can make in their own behalf against the Texas statute on abortion as being unreasonable for not permitting abortion where the child may be born with a defect from any of the previously listed causes is that caring for the child will place financial and other burdens upon them, the Texas legislative judgment must be sustained as a reasonable one. The value of human life and its continuance is too precious to warrant crediting such an argument. Children born with defects can be assisted in many ways and so can their families. Many of the causes of these defects are already controllable. When children with defects are born from these causes, they can be provided with services of rehabilitation and education.

Argument Three: The grounds for abortion should be extended to include a pregnancy resulting from forcible rape and incest.

The argument made in favor of this ground is lacking even the support that pro-abortionists can bring to bear in favor of abortion in the first two arguments. In many instances, if not most, there will be no possibility of urging that there is a psychiatric reason or a probable child defect as a justification for the abortion. The basis for urging that the Texas legislative judgment in not allowing this ground for an abortion is unreasonable must be that the child is unwanted and will create various kinds of burdens for the mother or the mother's family.

No one can fail to have the deepest sympathy for the woman or teenager who becomes pregnant as a result of forcible rape or incest. But at the center of the problem for the community is the existence of a perfectly healthy and probably normal unborn child who is innocent of any wrong doing and as a human person has the constitutional right to life. With recognition of and committment to the unborn child as a human person, there is only one answer which a reasonable political society and its government can give to this problem: the protection of the life of the unborn child.

The first pertinent observation is that life in civilized society involves some risk. Daily we experience the commission of crimes against both the person and property. We also witness the ravages which automobile accidents inflict upon the health and lives of our citizenry. And we have lived through years of large and small wars with the weekly reports of the dead and wounded among our young men. Society has not been without resources, although it has been frequently tardy in utilizing them, for overcoming these risks and dealing with the facts of death and injury. So, too, in the case of forcible rape and incest that results in pregnancy, there are societal measures that are being taken and can be taken to protect against these invasions of bodily integrity and respond to the problems which they engender for the woman or teenager who becomes pregnant as a result.

Granfield observes greater efforts by the community at providing information about birth control, sex education, and caveats about behavior in certain social and physical contexts likely to subject a woman to attack provide a first kind of alternative to destruction of the unborn child.[1] They at least are directed at the cause of the rape whereas abortion following rape will neither undo the rape nor prevent others from occuring.

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[1]Granfield, Supra at 209

While forcible rape cases represent less than one per cent of the total of nearly 3,000,000 serious crimes in the country annually, and while perhaps no more than 5% of the 23,000 forcible rape cases annually result in pregnancy, the problem is a serious one for the woman affected. While there exist Child and Family Services in Texas and other states that provide special care for pregnant women in a situation of indigency or emergency, undoubtedly these states should undertake greater measures to provide for their problems. Both counseling and financial assistance should be provided in sufficient amounts. The Texas State Department of Public Welfare already provides a wide range of services for children and their mothers which includes the unmarried mother.[2]

There apparently are medical means increasingly becoming available to prevent progress of the pregnancy by forestalling nidation or implantation such as the administration by a physician of an appropriate dosage of estrogen to the victim of forcible rape. Norbert J. Mietus has stated:

> "This procedure is not regarded as abortion and many doctors, with support from some moral theologians, argue that it is defensible because no direct attack is directed against the potentially fertilized ovum. Other observers and the author would argue that biologically and legally, if conception has occurred, only morally questionable sophistry could justify the action which thwarts the normal development of the existing life. However, it is possible that the estrogen acts somewhat in the manner assumed to be true of the IUD (intra-uterine device): to speed the journey

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[1]Federal Bureau of Investigation, "Crime in the United States, Washington D.C., U.S. Dept. of Justice, 1965. 3.

[2]Texas State Department of Public Welfare, Manual of Services, Austin: Feb. 1967

of the female ova through the Fallopian tubes too rapidly to be fertilized." 1

Amicus specifically refrains from joining in any advocacy of the use of estrogen. The purpose of mentioning its potential usage is simply to indicate that medical science is devoting its research efforts to methods of avoiding pregnancy that may be quite responsive to the problem of the woman or teenager subjected to a forcible rape. Undoubtedly, a science that could develop the "pill" can discover means of preventing pregnancy following a forcible rape.

In light of the foregoing, the Texas legislative judgment of refusing to extend the grounds for abortion to cases of pregnancy resulting from forcible rape or incest seems quite reasonable.

Since every child resulting from a forcible rape is illegitimate where, as is usually the case, its parents do not marry each other, one necessary societal stel, as Granfield suggests, is reform the existing discriminatory laws against illegitimates. In Texas, for example, there is no requirement that the father support his illegitimate child. There are also problems for the illegitimate child with respect to inheritance, name, custody, and welfare assistance laws. Rationalizing this law vis-a-vis the illegitimate will materially assist to lessen the burden upon the woman or teenager of carrying to term the unborn child who is the product of a forcible rape. 2

In light of the foregoing consideration, the Texas legislative judgment of refusing to extend the grounds for abortion to cases of pregnancy resulting from

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[1]Norbert J. Mietus, The Therapeutic Abortion Act A Statement in Opposition, Sacramento: April, 1967. 48

[2]Granfield, supra, at 210-212

forcible rape or incest seems quite reasonable.

Argument Four: Liberalized abortion laws would greatly reduce the number of illegal abortions.

The author of the California Therapeutic Abortion Act estimated that this law would legalize no more than 5 per cent of what may now be illegally performed abortions.[1] Granfield reports upon the studies of Scandinavian-type abortion legislation which shows that instead of illegal abortions being eliminated, which was one of the purposes of the legislation, they have actually increased. This is true of all the Scandinavian countries.[2] Thus, this argument seems hardly to warrant an attack upon the reasonableness of the Texas legislative judgment in maintaining its current abortion law as being the source of illegal abortions unless the position of appellants is that Texas cannot constitutionally control the reasons for which abortions are performed, the position taken concerning Georgia in the Bolton case, supra, a position that seems wholly unsupportable for reasons developed earlier.

One of the positive reasons for not extending the grounds for abortion beyond that of preserving the life of the mother is that there is considerable evidence that the performance of abortions still involves considerable danger to the mother. All of the current methods utilized for performing abortions are thoroughly reviewed by Callaghan. While most recent literature is less pessimistic about the dangers of induced abortion, there are physicians and scientists of distinction who take the position that abortions performed even by skilled physicians are more dangerous than the public and many doctors realize.

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[1]Mietus, supra at 6.

[2]Granfield, supra, at 89-90

allaghan quotes R. R. MacDonald with respects to the dangers involved in abortions performed after the tenth week:

> "By that time the cervix has softened appreciably and the uterus is palpable abdominally, globular in shape, soft and vascular. Dilation and curettage is quite likely to cause traume to the cervix and, even with drugs to make the uterus contract, there is usually a lot of bleeding, while perforation of the uterine wall is surprisingly easy. Abdominal hysterotomy may be necessary to empty the larger uterus. This can be quite difficult and there is the extra hazard of the abdominal incision. Hypertonic glucose or saline injected into the amniotic cavity kills the fetus and induces uterine contraction quite quickly. This gives the impression of being an elegant method of inducing abortion when the uterus has reached 16 weeks' size, but in fact quite a few deaths have occurred from pelvic infection and cerebral hemorrhage...A British urologist reported (Feb., 1967) after a visit to a kidney unit in Rumania that 300 patients had been admitted to the unit with renal failure following septic abortion.[1]

It would appear that Texas legislative judgment is reasonably supportable from the point of view that it confines abortion to those unavoidable situations involving the necessity for preserving the life of the mother although considerable danger may be involved for the mother from the abortion itself.

Finally, it should be observed that the Texas law of abortion is not without a reasonable scope for protecting the life and death of the mother. There has not been

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[1]Callaghan, supra, at 35 quoting R.R. MacDonald, "Complications of Abortion," Nursing Times. 63 (March 10, 1967) pp. 305-307.

extensive adjudication covering the meaning of the exception to the traditional abortion laws permitting, as in Texas, an abortion "by medical advice for the purpose of saving the life of the mother." What cases have construed such provisions are clear that these statutes give considerable scope to a physician in making a good faith judgment that an abortion is necessary in order to save the life of the mother and even to avoid a grave impairment to her health. As the Supreme Court of Iowa stated in State v. Dunklebarger, 206 Iowa 971 (1928):

> "In order to justify the act of Dr. Wallace (the defendant), it was not essential that the peril to life should be imminent. It was enough that it be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the death of the patient would be otherwise certain in order to justify him in affording present relief.
>
> "Inasmuch as the question of necessity can ordinarily be determined only by medical opinion, it follows naturally that a physician, who examines a patient, must form an opinion in good faith, and must act upon it in like good faith. It follows also that if a regular physician does make an examination , and does act upon it, he is entitled to the presumption of correct judgment and good faith until the contrary be proven. 221 N.W. at 596, 594.

The Supreme Court of Oregon in State v. Buck, 200 Or. 87 (1953) stated:

> "The relief of a woman whose health appears in peril because of her pregnant condition attains the same importance as the necessity 'to preserve the life of such mother'." 262 P.2d at 502.

The result reached in the Buck case was based upon the Court's construing together the state's Criminal Abortion

Act and its Medical Practice Act as if they were one act. The latter act had characterized as "unprofessional" and "dishonorable"

> "The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril after due consultation with another licensed medical physician and surgeon." 262 P.2d at 500.

These two cases indicate that there is considerable room for addressing the traditional abortion statute to a wide variety of situations involving the necessity of preserving the life of the mother or avoiding a grave peril to her health.

The choice that Texas has made in favor of permitting only such abortions as there seems quite reasonable in light of its proportioning the death of the unborn child to act of a physician or another on the basis of medical advice in performing an abortion deemed necessary in good faith in order to preserve the life of the mother or to avoid a grave peril to her life. Its reasonableness is based not only upon that proportion but also upon the status of both the unborn child and the mother as human persons protected by the constitutional safeguards of the person and the necessity for the state to regard the status and condition of both the mother and child. Its reasonableness is based further upon the inadequacy or lack of persuasiveness of the reasons urged for extending the grounds for abortion to those urged by appellants and others like them. It reasonableness is based finally upon the still considerable danger to the mother of abortions at various stages according to the assertions of able physicians and scientists.

POINT THREE

SINCE THE UNBORN CHILD IS A PERSON AND HAS A A RIGHT TO LIFE PROTECTED BY THE FOURTH, FIFTH, NINTH AND FOURTEENTH AMENDMENTS, IF THIS COURT SUSTAINS THE LOWER COURT DECISION THAT ARTICLES 1191-1194 AND 1196 OF THE TEXAS PENAL CODE ARE UNCONSTITUTIONAL AND TO BE GIVEN NO FURTHER OPERATION, THIS COURT MUST ALSO RENDER A DECISION STATING THE GROUNDS UPON WHICH ABORTIONS MAY CONSTITUTIONALLY BE SECURED OR PERFORMED AND PROVIDE OR DESIGNATE THE TRIBUNALS FOR ADMINISTRATION OF THOSE STANDARDS IN ACCORDANCE WITH THE REQUIREMENTS OF BOTH SUBSTANTIVE AND PROCEDURAL DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT, AND, SINCE IT IS FEDERAL ACTION THAT CREATES THE HAZARD FOR UNBORN CHILDREN, OF THE FOURTH, FIFTH, AND NINTH AMENDMENTS.

In Point One, amicus has demonstrated that the unborn child is a person and has a right to life protected by the Fourth, Fifth, Ninth, and Fourteenth Amendments. Amicus also has demonstrated in its Point Two that the Texas legislative judgment in establishing and continuing to maintain its law of abortion is clearly a reasonable one in light of the reasons for its adoption and the unpersuasiveness of the reasons offered by appellants and others for changing it. Should, however, this Court hold that, for some reason, the Texas law of abortion is unconstitutional and is to be given no operation, as the lower court has held, then this Court, as has the lower court, will have by federal action placed in jeopardy the rights of the unborn child to life, which, it is assumed for the purposes of this point, this Court is willing to hold is protected by the Constitution.

The federal judicial action assumed for discussion in this point would leave the right of the unborn child to life unprotected by state criminal law and, for all practical purposes, by much, if not all, of its civil law. Without this protection, the federal judicial action

would, in effect, be delegating over to private persons, such as the appellants, control over the unborn child's right to life. Unless this Court, in such event, provides standards to be observed before abortions may be performed by private persons and provides or designates tribunals for administration of those standards, it is the contention of amicus that this federal judicial action would be violative of the rights of the unborn child protected by the Fourth, Fifth, Ninth, and Fourteenth Amendments.

It is well established that the action of a court is either state or federal action that can be violative of constitutional limitations upon government. Shelley v. Kraemer, 334 U.S. 1 (1948); cf., Hurd v. Hodge, 334 U.S. 24 (1948) and Bolling v. Sharpe, 347 U.S. 497 (1954). Even though this Court is the final arbitrer of what the constitutional protections of the person are, it is, of course, obvious that it is subject to constitutional limitations with respect to the method by which it implements the last word decisionally, as in this case, with respect to the invalidity of a state statute directing itself to the protection of the constitutional right to life of a person. The Court has been faced with a similar problem earlier. In Baker v. Carr, 369 U.S. 188 (1962) this Court held that a complaint charging that a Tennessee legislative districting statute denied equal protection of the laws to voters alleged a justiciable cause of action. In Reynolds v. Sims, 377 U.S. 533 (1964) this Court held that the legislature of Alabama had been unconstitutionally apportioned. It also held that the lower court

> "in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was an appropriate and well considered exercise of judicial power." 377 U.S. at 586-587.

In discussing the problem of federal judicial rem-

edy to be dealt with once a state legislative districting statute had been held unconstitutional, this Court had four concerns: (1) the protection of the right to vote in the absence of a valid statute; and (2) the protection of the right to vote against further elections under the invalid statutory plan; (3) recognition of the state interest in conducting elections so that, under certain circumstances, such as where an impending election is imminent and a state's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief; (4) establishment of standards for governing action by a federal district court in considering the various factors that should inform its decision-making with respect to that action: viz., "general equitable principles". Id. at 585-586.

In discussing the problem of federal judicial remedy presented in the event that this Court holds the Texas law of abortion to be unconstitutional but affirms that the unborn child is a person and has a right to life protected by the constitutional safeguards of the person, amicus suggests that a central focus of a decision about remedy must be the unborn child whose right to life is placed in danger by the federal invalidation of the Texas law. Just as its mother, father, and their physician have, under the hypothesis being here pursued, a constitutional right that serves to move this Court to invalidate the Texas law, so, too, does the unborn child have a constitutional right to life and the State of Texas a right to act to protect that right to life in a reasonable, constitutional manner. It is in this respect that the problem of remedy is a far more complex and urgent one than that presented to this Court in the legislative redistricting cases.

Under this hypothesis, not only must the Court, as in the legislative redistricting cases, act to protect the interest of the persons whose constitutional right it may hold to have been infringed, but also it must act to protect the interest of the person, viz., the unborn child, whose constitutional right to life would otherwise be in-

fringed by persons in the position of the appellants without possibility of recourse by that child and the State of Texas.

Amicus incorporates by reference the argument made under its Point Two, subpoint B, supra, with respect to the issue of unconstitutional delegation of legislative power and the issue of denial of equal protection of laws and makes that argument applicable to the action of the federal courts in not devising a remedy that will adequately safeguard the right to life of the unborn child. The thrust of the argument in Point Two was that the State of Texas had acted reasonably in enacting its law of abortion because it had thereby avoided an unconstitutional delegation of legislative power to private persons and permitting private persons to draw invidious and arbitrary distinctions constituting a denial of equal protection of the laws to unborn children. The thrust of the argument here with respect to these two issues is that the federal courts must design remedies that also avoid these two results. Amicus assumes that the federal courts are subject to limitations in delegating judicial power similar to those under which the Congress operates in delegating legislative power where a constitutional safeguard of the person, and particularly the safeguard of the right to life, is involved. Cf., Eli Lilly & Co. v. Schwegmann Bros. Giant Super Markets, 109 F.Supp. 269 (D.C. La. 1953) affirmed 205 F.2d 788 (C.A. 5, 1953), cert. denied 346 U.S. 856 (1953); United States v. United Mine Workers of America, 330 U.S. 258 (1947).

It is generally recognized that many of the grounds for abortion that have been urged by appellants and by others in their position involve vague judgmatical standards that enter into realms of decision and prediction going well beyond the medical world and its expertise, such as considerations of morals, religion, economic factors, social relationships within the family, number of children, the "socioeconomic state" of the patient, and even legal standards such as the concept of rape and incest. What standards of "rape" and "incest" shall be used? That there are considerable difficulties

in the application of these concepts by the courts is well recognized. There are serious fact-finding problems concerning the actual occurrence of intercourse, the participation by the defendant, and the lack of consent by the affected woman. With respect to incest, there are vast differences in the legal standards adopted in the various states concerning the prohibited relationship, the knowledge that is required concerning the prohibited relationship, and the element of consent.[1] It would seem utterly necessary, if the Texas law of abortion is to be invalidated, that the federal courts set up substantive standards to protect the constitutional right to life of unborn children.

Application of such substantive standards required of federal courts, under this hypothesis, must as a matter of procedural due process be done either by the federal courts or by some adequate tribunal. This Court has recently had occasion to speak of the requirements of due process of law with respect to termination, not of a person's life, but of his or her welfare assistance payments under federally assisted programs in the case of Goldberg v. Kelly, 397 U.S. 254 (1970).

In the Goldberg case the question for decision was whether a state which terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment. The New York statute in question did provide the recipient a "fair hearing" following termination of his public assistance. Prior to termination the statute required only an informal investigation without any provisions for personal appearance of the recipient before the appropriate official, for oral presentation of evidence, or for confrontation and cross-examination of adverse witnesses. This Court held that the New York statute denied recipients of public assistance payments procedural due process of law by virtue of failing to pro-

1 See, Granfield, supra at 188-193.

vide them with an evidentiary hearing prior to the termination of their payments. In the opinion for the Court, Mr. Justice Brennan stated:

"'By hypothesis, a welfare recipient is destitute, without funds or assets. ...Suffice it to say that to cut off a welfare recipient in the face of ... brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. Kelly v. Wyman, 294 F.Supp. 893, 899, 900 (1968).

"The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege' and not a 'right'.

"It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing. But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. For qualified recipients welfare provides the means to obtain essential food, clothing, housing, and medical care. Thus the crucial factor in this context--a factor not present in the case of the blacklisted governmental contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended--is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.

"Moreover, important governmental interests are

promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. ...We have come to recognize that forces not within the control of the poor contribute to their poverty. ...Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the community. ...The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end." 397 U.S. at 261-3.

In the instant case more than the right to public assistance in the form of medical care for unborn children or assistance for their mothers is involved. It seems clear that the federal courts must, in the absence of a valid state law on abortion, provide or designate a tribunal to consider individual cases of desired abortion and provide for the appointment of a guardian ad litem to protect the life of the unborn child against unwarranted invasion due to the failure to satisfy constitutional criteria for valid abortions. If public assistance, whether of money or medical care, for the mother, including the mother of an unborn child, cannot be terminated without a prior hearing and the opportunity to know the grounds being relied upon for termination and for cross-examination of the social worker involved, it must be even more true that the life of a human person, including that of the unborn child, cannot be terminated validly, at least under standards going beyond the "medical" standards of the State of Texas and District of Columbia statutes, without a hearing of the child through a guardian ad litem before some competent tribunal. All that can be said of the recipient of welfare and his or her dependence upon it is even more true of the unborn child in its mother's womb. The child in the womb also needs "essential food, ...housing, and medical care." Termination of the life of the unborn child also deprives that child "of the very means

by which to live." Also, "(h)is situation becomes immediately desperate." Indeed, the situation for the unborn child becomes much more desperate than for the welfare recipient once the decision to terminate has been made. There is no hope of escape for the unborn child while at least the welfare recipient can hope to escape by some effort of his own or by some unforeseen course of events. Moreover, by requiring a pre-termination hearing "important governmental interests are promoted". "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders..." including unborn children. By meeting the unborn child's basic demands for life, government generally and the federal courts, in particular, "can help bring within the reach of..." unborn children "the same opportunities that are available to others to participate meaningfully in the life of the community." Ibid.

The application of the Goldberg case rationale to the situation now envisaged is an a fortiori matter, therefore. Indeed, it may well be that the pre-termination hearing required under that rationale will not suffice with respect to the official decision to permit termination of human life by abortion. Under the New York statute the right was accorded to the welfare recipient to a fair hearing after the termination of public assistance to him. But that kind of hearing is not an available or feasible one in the instant situation. The unborn child's life is taken by the termination and not merely his right to welfare assistance. Moreover, it is life and not just public assistance that is at stake. Amicus contends that the abbreviated evidentiary hearing required by Goldberg before termination of public assistance is an insufficient protection of the constitutional right to life of unborn children before termination of that right by action or permission of a competent tribunal. The pre-termination stage is, for the unborn child, the final stage. For this reason, amicus contends that all of the due process requisites, including notice, representation by counsel, evidentiary hearing, trial, and record, must be provided the unborn child at the pre-termination proceeding before abortion is performed.

The reliance placed so far, in this question of procedural due process, upon the Goldberg case must not divert attention from the fact that the whole realm of procedural due process cases, whether involving the criminal or civil procedure in adjudication by courts, the procedure employed by administrative agencies, or the procedure utilized by other official agencies of government, support the position of amicus. It would be a mockery of the very concept of procedural due process to insist upon important procedural safeguards in criminal adjudication and in administrative decision-making in matters involving life, liberty, and property while permitting federal courts, in the situation here hypothesized, to decide upon permitting the termination or destruction of the life of a human being, an unborn child, without requiring the substance of the same important procedural safeguards absent some emergency involving the necessity of acting to save the life of the mother or avoiding a grave peril to her health. Perhaps the matter has been no better stated than by Professor Kenneth Pye:

> "The notion of a national concept of basic justice does not seem too radical for America a century after the Civil War. It is not surprising that the majority of the Court has accepted the argument that the genius of federalism does not require that states be permitted to experiment with the fundamental rights of defendants in criminal cases any more than it permits experimentation with first amendment freedoms. The mere status of being in America should confer protection broad enough to protect any man from the vagaries of a state which by inertia or design fails to keep pace with a national consensus concerning the fundamental rights of the individual in our society."[1]

But if the states cannot be permitted to experiment with the fundamental rights of the individual human person in

1 Kenneth Pye, "The Warren Court and Criminal Procedure," 67 Mich. L. Rev. 249 at 258 (1968).

our society, neither can the federal government be permitted to experiment with those rights, and especially with the right to life of defenseless, innocent unborn children.

As appellants would have it, the federal courts should simply declare the Texas law of abortion unconstitutional and enjoin its further enforcement. The disregard for the sanctity of human life involved in this position is total with respect to unborn children. There is no focus upon the interests of these children. There is left no express standard for judgment which requires either the parents, the federal courts, or any other agency of government, or physicians to consider the interests and welfare of unborn children. On the other hand, the only focus of this position is upon the interests of the mother and the father. The denial of substantive due process to which the present argument is directed is not the invidious discrimination between two human persons, the mother and her unborn child or the unborn child subjected to abortion and the one not so subjected. It is rather the denial of substantive due process involved in the total failure of the appellants and the lower court to take the human person into account whose life is to be destroyed as a result. This type of position and decision-making cannot be permitted. It contains no rational connection between the means selected and the goal pursued. Protection of the health, both physical and mental, of the mother is a legitimate goal of government. It is not a legitimate means of government to destroy the innocent human life of an unborn child in a situation in which that life bears no threat to the life of its mother or a grave peril for her health. Rather the protection of such life is a goal or end of government in free political societies. Before the life of an innocent unborn child can be destroyed as a result of a federal court decision, there must be a sufficient reason for destroying it, if this is to be allowed at all. The reason must be grounded in the nature or situation of the child and the threat it carries, if it so does, to its mother. The threat must be real and not feigned. The threat must be one that cannot be otherwise dealt with

by physicians than by the taking of the life of the unborn child. If the situation is anything short of this, there can be no rational justification for the taking of the life of an innocent unborn child. From the standpoint of substantive due process, the essential vice of the position of appellants and the decision of the lower court, is that it requires no focus upon the interests of the unborn child and whether the child is a threat to the life of or a grave peril to the health of its mother. Because that position and decision is devoid of any regard for the interests of the unborn child, the destruction of whose life they support, they are wholly arbitrary and unreasonable. They fail to insist upon a reason for destroying the life of the unborn child that is sufficient relative to the great interest that is being destroyed and that is grounded upon what is necessary to be done in order to deal with harm to the mother that is being caused by or that is traceable to that child.

The cases that most closely support the above analysis are those that view the infliction of great deprivation upon innocent persons as punishment that cannot be constitutionally justified. If it is not constitutionally permissible to make it a misdeameanor, subject to a mandatory jail term of not less than 90 days, for a person to be addicted to the use of narcotics, surely it is not constitutionally permissible to destroy an innocent unborn child, a human person also, for a reason that is not grounded in the threat to the life or the grave peril to the health of its mother which it presents, but rather for a reason grounded wholly in the interests of the mother unrelated to the interests of the child. See, e.g., Robinson v. California, 370 U.S. 660 (1962). Moreover, if it is not constitutionally permissible to impose expatriation upon a native-born citizen because of war-time desertion from the armed services or for voting in a foreign election, surely it is not constitutionally permissible to expatriate an unborn child from all human society by abortion for a reason that is not grounded in any threat to the life of or grave peril to the health of its mother. See, e.g., Trop v. Dulles, 356 U.S. 86 (1958). These cases were decided in part under the Eighth Amendment as involving cruel and unusual punish-

ment.

The decisions holding that Congress has no power to strip citizens of their citizenship without their consent because of the Fourteenth Amendment regulation of what persons are citizens of the United States are obviously also relevant. See, e.g., Afroyim v. Rusk, 387 U.S. 253.(1967). It is not inappropriate to point out that in the latter case the Court was talking about a person who was born in the United States. The Court specifically observed that Congress had no authority under the Fourteenth Amendment to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. But if Congress has no such power, how can it constitutionally undercut the effect of birth by decreeing before that event the destruction of the innocent unborn child who, upon birth, would have become a citizen by virtue of the same Constitution. If this Court or Congress could permit or direct this destruction without regard for the interests of the unborn child, they could destroy its right of citizenship, which is not constitutionally permissible. For this reason, it cannot be constitutionally permissible to prevent the unborn child from becoming a citizen by birth except for reasons that can pass muster under the concept of substantive due process.

The substantive due process cases bearing the closest analogy to the instant case are those concerned with the protection of the right to free speech. The right to life is one of the most important, if not the most important of, constitutional rights. The right to free speech is also a very important constitutional right of the person. Under the Fourteenth Amendment Due Process Clause "life"is specifically protect d while free speech is protected under the aegis of "liberty". Of course, the First Amendment protects free speech specifically against federal action and the Fifth Amendment protects life specifically against such action. The point here is that without protection of the life of a person there cannot be any recognition or protection of his right to liberty and to property.

We should say, at least, that the important constitutional right to life should not be less protected than the constitutional right to free speech. Probably, it should receive even greater protection. Yet an examination of the free speech cases indicates that the right to free speech is a highly protected constitutional right. In the earlier cases, the doctrine emerged that "the holding of meetings for peaceable political action cannot be proscribed". De Jonge v. Oregon, 299 U.S. 353, 365 (1937). The right of free speech in this context was an absolute right against government. Even in the context of speech advocating the overthrow of government by unlawful force, Justices Brandeis and Holmes articulated the test of the protection of such speech that was to be given effect in a broad spectrum of cases involving speech:

> "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. ...the issue (is) whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was so substantial as to justify the stringent restriction interposed by the legislature." Whitney v. California, 274 U.S. 357, 378-379 (1927).

In more recent decades, the degree of the constitutional protection of speech has brought even more stringent standards for its protection by the courts in many contexts. Mr. Justice Black insisted that there is an absolute prohibition against the government awarding damages to a public official in his suit against critics of his official conduct. New York Times v. Sullivan, 376 U.S. 254, 293 (1964). With respect to advocacy of possibly violent political action at a meeting of the Ku Klux Klan, Mr. Justice Douglas took the position that the "clear and present danger" test does not sufficiently protect speech and

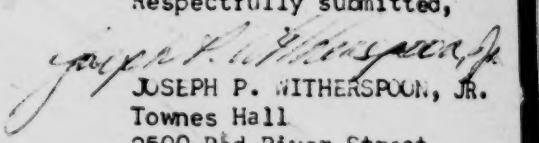
"is not reconciliable with the First Amendment in days of peace. ...I see no place in the regime of the First Amendment for any 'clear and present danger test', whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it." Brandenburg v. Ohio, 395 U.S. 444, 452, 454 (1969) (dissenting opinion, Mr. Justice Black, concurring).

If there ever was a constitutional right that was entitled to be treated as an "absolute" one, it is the right to life of an innocent person, and especially that of an unborn child. There is good precedent for so holding drawn from the cases protecting the lesser, although highly important, constitutional rights of free speech, freedom of religion, and freedom from law respecting establishment of religion. But at the very least, that protection should not be less than the highest protection accorded under the decided cases to these important rights. In light of these cases no decision can possibly pass constitutional muster under the Due Process Clause of the Fifth Amendment, considered in its substantive aspects, if that decision authorizes the performance of abortions without a consideration of the crucially important interests and rights of the unborn child, without a direction for a response to those interests, and without a requirement that the most compelling and vital interests of government be involved and that the abortion be necessary to accomplish those interests where no reasonable alternative is available.

CONCLUSION

For the reasons stated in this brief and in the brief of the appellee, amicus respectfully urges that this Court reverse the judgment of the three-judge court below insofar as it held unconstitutional the Texas law of abortion and affirm the judgment of that court insofar as it denied injunctive relief. But if this Court affirms the judgment of the three-judge court below insofar as it held unconstitutional the Texas law of abortion, amicus respectfully urges, in the alternative, that this Court provide substantive standards for guiding decision concerning performance of abortions so as to protect the constitutional right to life of the unborn child and provide or direct the resort to a competent tribunal for a hearing in accordance with procedural due process before an abortion going beyond the Texas law of abortion is permitted to be performed.

Respectfully submitted,



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